UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HARBOR VIEW HEALTH CARE CENTER

and Case No. 22-CA-28151
22-CA-28347

SEIU 1199 NEW JERSEY HEALTH CARE UNION

Saulo Santiago, Esq. Newark, NJ,
for the General Counsel
David F. Jasinski, Peter P. Perla, and Ian A. Weinberger, Esqs., (Jasinski, P.C., Newark, NJ*)*,
for the Respondent

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This case stems from charges in Case Nos. 22-CA-28151, 22-CA-28347 filed on December 3, 2007 and April 30, 2008, respectively, by SEIU 1199 New Jersey Health Care Union (1199NJ or the Union) against Harbor View Health Care Center, (Harbor View, the Employer or Respondent). On July 29, 2008, the Regional Director for Region 22 issued an Order Consolidating Cases, Consolidated Second Amended Complaint and Notice of Hearing (the complaint) alleging that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. The complaint alleges, in essence, that Respondent unlawfully failed to and delayed in providing information to the Union and that it unilaterally implemented terms and conditions of employment for employees represented by the Union. The Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as will be discussed, as relevant, in further detail below.

On September 3, 2009, based upon an amended charge filed in Case No. 22-CA-28151, Counsel for the General Counsel issued a notice of motion to amend the complaint to further allege that Respondent unilaterally failed and refused to make contractually required pension fund contributions, and so moved at the inception of the hearing. [1] Respondent denied the material allegations of the amendment to the complaint and argued that they do not relate back to the original charge and are time-barred by Section 10(b) of the National Labor Relations Act.[2]

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[1] At the hearing, I reserved ruling on the motion. As discussed below, General Counsel's motion to amend the complaint is hereby granted.

[2] In its answer to the complaint, Respondent asserts a Section 10(b) defense generally, "to the extent [the complaint] refers to or relies upon events and circumstances occurring beyond the limitations period. . ." Other than those allegations relating to Respondent's alleged failure to make pension fund contributions, Respondent has failed to specify any other allegation of the complaint which it is contesting on this basis, and does not raise any such claims in its post-hearing brief. It is well settled that the party raising an affirmative defense bears the burden of proof. As Respondent has failed to specify those allegations of the complaint to which such an

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A hearing on this matter was held before me on September 3, 17, 30 and October 1, 2009 in Newark, New Jersey. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a New Jersey corporation with a facility located in Jersey City, New Jersey, is engaged in the operation of a nursing home and rehabilitation center. During the 12-month period preceding the issuance of the complaint, the Respondent derived gross revenues in excess of $100,000 and purchased goods valued in excess of $5,000 directly from points outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Contract Negotiations and Related Requests for Information

1. Background

As noted above, Respondent operates a long-term health care facility in Rochelle Park, New Jersey. It it one of several facilities operated by the Omni Management Corporation, (Omni), a company that manages a number of nursing homes in New Jersey including Castle Hill Health Care Center, Bristol Manor Health Care Center and Palisade Nursing Center (hereafter Castle Hill, Bristol Manor and Palisade).

The Union and Respondent have been parties to a series of successive collective-bargaining agreements covering a unit of full-time and regular part-time licensed practical nurses (LPNs) certified nurses aides (CNAs), nurses aides, dietary and housekeeping employees and recreation employees.[4] The Union or its predecessor has represented employees at this facility since about 1992 and there have been a series of collective-bargaining agreements entered into by the parties since that time. It appears from the record, however, that these agreements consist primarily of memoranda setting forth economic terms and amendments to the prior agreeement. The most recent of these was a five-year memorandum of agreement which expired on July 24, 2007 (the 2002 MOA). The MOAs for Castle Hill, Bristol

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affirmative defense might apply, or to cite any evidence to support the general assertions contained in its answer, I conclude that it has failed to meet its burden of proof in this regard.

[3] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding as well as an assessment of the demeanor of the witnesses. In addition, the inherent probability of the testimony has been utilized to assess credibility. Where there is an apparent conflict in the evidence of particular relevance to my determinations herein, I have endeavored to explain the specific basis for my conclusions. Otherwise, testimony contrary to my findings below has been discredited on some occasions because it was in conflict with the credited testimony of others, otherwise incompatible with more reliable evidence or because it was inherently incredible or unworthy of belief.

[4] Respondent amended its answer at the hearing to admit the appropriate unit.

Manor and Palisade expired on the same date as well, and the bargaining for these four facilities overlapped for some time. Although this proceeding relates to Harbor View only, from time to time the parties made reference to discussions at other tables, as will be described as is relevant to the issues herein.

The bargaining for a successor agreement commenced in June 2007 and continued until March 2008. Respondent then declared impasse and implemented its final offer on or about April 1, 2008. There were no further meetings until August 2009 when, subsequent to a three-day strike at the Omni facilities referenced herein, a negotiation was scheduled and held in September 2009. Throughout the 2007-2008 negotiations Respondent represented by its attorney David F. Jasinski, who was the lead negotiator, and consultant Mendy Gold.[5] With the exception of the last session, the Union was represented in bargaining primarily by executive vice-president Clauvice Saint Hilare, assisted by international representative Ron McCalla. There was also an employee bargaining committee which attended each scheduled session. In addition, in about August 2007, the Union asked for a federal mediator. Respondent agreed to this request, and James Kinney was appointed by the Federal Mediation and Conciliation Service (FMCS) to assist in the negotiations.

2. The April and June Requests for Information, and Respondent's Initial Response

In anticipation of bargaining, on April 25, 2007, Saint Hilare wrote to Harbor View administrator Kevin Woodward requesting certain information, as follows:

> *SEIU 1199 New Jersey Health Care Union requests the following information, which it needs for upcoming negotiations for a successor agreement. Please provide the information no later than May 15, 2007. At the same time, I would suggest May 22 or 24 as bargaining date.*
>
> *1. Any and all documents, including but not limited to job descriptions and performance evaluations, that describe the job duties for all bargaining unit positions;*
>
> *2. For each employee working in a bargaining unit position, such documents as will show the following:*
>
> *a) Job title for each employee;*
> *b) Date of hire;*
> *c) Current hourly rate of pay;*
> *d) Regular hours of work;*
> *e) Number of overtime hours worked on a quarterly basis in 2006 and 2007;*
> *f) Address;*
> *g) Whether employee is a no-frills employee;*
>
> *3. Documents, including but not limited to summary plan descriptions that show all fringe benefits such as health insurance, disability, pension, profit sharing, and 401(k) benefits available to or provided to part-time and full-time employees in the bargaining unit;*
>
> *4. Any and all manuals or other documents, including documents distributed to employees, that describe any of the terms and conditions of employment for employees in the -bargaining unit;*

[5] Gold did not testify herein.

5. Gross annual payroll for the bargaining unit for the periods January 1, 2006 through December 31, 2006 and January 1, 2007 through March 31, 2007;

6. Total cost to the Employer for each of the following benefits provided to bargaining unit employees during the periods January 1, through December 31, 2006 and January 1 through March 31, 2007: health, dental, vision, life insurance and pension;

7. Number of employees covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child;

8. Names of all agencies used by the Employer to provide temporary staff;

9. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007;.

10. Copies of work schedules for each nursing unit and/or department for the months October through December, 2006, and January through March 2007;

11. OSHA injury and illness records for 2005, 2006 and 2007.

12. Any and all documents setting forth policies regarding overtime work (both voluntary and mandatory), shift differentials and/or any form of premium pay for employees in the bargaining unit;

13. Any and all documents setting forth policies regarding health and safety in the workplace;

14. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Respondent, through Jasinski, initially replied to this information request on June 1, 2007. He enclosed a list of employee names with addresses, job classifications, wage rates, dates of hire, job status, health insurance coverage and average hours for a two-week period.

On June 4, Saint Hilare responded to Jasinski in relevant part, as follows:

The Union has made numerous unsuccessful attempts to scheule negotiations by phone and in writing. We have received part of the info requested for Palisade, Castle Hill and Bristol Manor. The Union is available for bargaining on June 14, 19, 20 and 21, 2007. The Union suggests we start with Castle Hill. Please advise regarding your availability. The Union has no problem bargaining at the facility or at the Union's office.

As of today, we have received no response to the bargaining notice to Harborview Health Care Center and no response to the info request. A the last phone conversation, you said that you are the counsel assigned to negotiation the Harborview contract but w have received no indication in writing that you are the negotiator for this Nursing Home.

For the record, I just want you to know that the package you sent to the Union contains

for Bristol Manor: Employee list with rate, social security number, date of hire and a policy manual; for Castle Hill only a cover letter and a policy book; for Palisades: Employee list with rate, social security number, date of hire and a policy manual. In order to prepare for negotiations, the Union requests the following information:

- *An updated list of all employees performing bargaining unit work by job classification in seniority order, including name, address, social security number, job title, date of hire, wage rate, shift, enrollment in health insurance (and at what level of coverage, individual, dependent, or family), part-time or full-time status, number of hours worked and paid since January 1 2007, and amount of vacation days, sick days, personal days and/or holidays earned but unused for the employees at Castle Hill. We did not receive any of this information in the package that you sent to the Union for Castle Hill.*

- *The gross bargaining unit payroll from January 1 2007 through June 30 2007 for Palisades, Bristol Manor and Castle Hill.*

Jasinski subsequently sent to the Union a copy of Respondent's employee handbook, benefits rider and summary description plan for its health insurance, which listed the various benefits offered to employees and set forth the costs to employees for dependent health care coverage. [6]

3. The First Bargaining Session -- June 19, 2007

This session was attended by Jasinski, Gold, Saint Hilare and an employee bargaining committee. Saint Hilare opened the meeting by stating that the Union's goal was to establish a statewide standard where members would get equal pay for equal work. The Union also wanted to add language to the contract to create a better work environment and smooth the relationship between management and employees. Saint Hilare also stated that the Union was seeking affordable health insurance and enhanced pension benefits for employees.

Jasinski testified that he understood the Union's reference to statewide standards to mean the so-called "Tuchman Agreement," a multi-employer collective-bargaining agreement negotiated by the Union with various other nursing homes and rehabilitation facilities in New Jersey. [7] He further stated that the Union wanted the Employer to participate in the Union's benefit plan – the Greater New York Benefit Fund (GNYBF)-- which provided for employer-paid dependent coverage. Jasinski told Saint Hilare that the Employer wanted to negotiate a contract for Harbor View that addressed the unique needs of the facility, its employees and its residents. Jasinski additionally made it clear that the Employer had no interest in participating in the Union's health plan, noting that it had experienced financial difficulties and the participating employers had had to increase their contributions to the fund.

After these initial presenations, the Union submitted its contract proposal, which contained economic and non-economic terms. The Union sought a three-year agreement with various modifications from existing terms and conditions including, among other things, a

[6] Single health insurance coverage was provided at no cost to the employees. The benefits rider listed the additional costs to employees if they wished to include family members under the Employer's plan.

[7] Jasinski subsequently testified that Saint Hilare referred to a "master agreement," but this testimony was adduced through a leading question from Respondent's counsel and I do not find that Saint Hilare made any such allusion.

reduction in the probationary period from 60 to 30 days, an increase in paid time off for employees, the Employer's participation in the GNYBF or another plan equal to or better than the Union's plan (including dependent coverage) with the cost of premiums to be covered exclusvely by the employer, the addition of parental and marriage leave and a health and safety clause which provided for a "zero lift" policy as well as the establishment of a health and safety committee. With regard to wages, the Union proposed a seven percent across-the-board raise for each of the three years of the agreement with minimum hourly salaries effective as of July 2009 of $11.00 for CNAs and $10.00 for dietary and housekeeping (also referred to as Grade 1) employees.[8] The proposal further provided that the employer would make contributions to the Union pension fund of three percent of gross payroll for each non-probationary employee covered by the agreement. Although the parties went through this proposal, there was little substantive discussion of it at the time. [9]

Saint Hilare then addressed the April 25 information request. Certain items sought had not been provided including information regarding employee overtime, the identification of no-frill employees,[10] OSHA records, agency usage and work schedules. Saint Hilare provided Jasinski with a copy of his April 25 letter with the outstanding items noted. Jasinski told Saint Hilare that the Union that the information it was seeking was irrelevant to the process and that the Union already had sufficient information to enable it to bargain for a contract but that he would look into providing additional information nonetheless.

There was also a discussion of the lack of a contemporary full collective-bargaining agreement. The parties both had a series of partial contracts, primarily addressing economic terms, but for years there had been no full agreement executed. According to Saint Hilare, Jasinski volunteered to prepare a document which represented the current terms and conditions of employment applicable to all the Omni facilities. Jasinski, to the contrary, testified that he agreed to the Union's request that he do so. Saint Hilare asked that Jasinski provide copies of the underlying documents he relied upon to prepare the compilation.

4. Interim Correspondence

On June 22, 2007, Jasinski wrote to Saint Hilare and enclosed additional information; i.e. the gross wages for January through December 2006 and January through March 2007 and the aggregate costs for health and dental premiums and life insurance for the same period of time.

On July 17, 2007, Saint Hilare sent the Employer a proposed contract extension. By letter dated July 24, Jasinski enclosed a revised extension agreement providing that the contract would be extended to September 7 and providing that all changes to the agreement would become effective upon approval and ratification of the parties.

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[8] Although the Tuchman Agreement had contract minimums of $11 and $10 for CNAs and Grade 1 employees, respectively, the term of that agreement was from 2005 to 2009.Saint Hilare testified, without rebuttal, that such minimum salaries took effect for certain nursing homes as early as 2005. Additionally, under the Tuchman Agreement, employees are eligible for employer-funded dependent health insurance after being employed for six months.

[9] Respondent adduced and relies upon testimony from Saint Hilare and McCalla that with regard to this, and all subsequent Union proposals, the proposals were formulated and submitted with the information the Union already had in its possession.

[10] No-frill employees are those who have agreed to forego certain contractual benefits for an enhanced wage rate. Under the 2002 MOA, the Employer was limited to offering such terms to 10 employees.

Thereafter, on July 27, Respondent sent additional information to the Union responsive to its prior requests: in particular, a corrected list of employee names, addresses, job classifications, wage rates, dates of hire job status, heathi insurance coverge and average hours for a two-week period during the prior six months. Jasinski asserted that this submission had completed the Union's information request.

On August 8, 2007, Saint Hilare sent a letter to Respondent suggesting bargaining dates for the Omni facilities during the month of August. The letter advised the Employer that the Union had contacted the New Jersey State Board of Mediation to secure a mediator and further noted that the Union had not received a management proposal at any of the Omni tables and requested that management put forward proposals at the next bargaining session for each of the facilities. In this letter, Saint Hilare further asserts:

> *We are in receipt of your Bristol Manor document compiling the various memorandums of agreement into one document. Needless to say we have many questions concerning this document. You agreed to supply a similar compilation document for each of the other Omni facilities and to supply copies of the MOAs that you used to produce each compilation document. Please inform us of the date you expect to complete this work.*

5. The "Compilation Document"

The parties had mutually acknowledged the fact that the disarray in their contract files coupled with the lack of an integrated contemporaneous collective-bargaining agreement presented an obstacle to negotiations. Thus, on June 19, the Employer had agreed to prepare a document representing existing terms and conditions of employment for the various Omni facilities.

When Saint Hilare and McCalla reviewed the document they found that it did not accurately represent existing terms and conditions of employment. For example, the probationary period had been extended from 60 to 90 days; there were increased restrictions on Union access to the facility; the agreed-upon process which would enable the Union to organize new departments without an election had been eliminated; the provision providing for daily overtime had been deleted and the allowable number of no-frills slots had been increased from 10 to 20. The threshold of hours required to qualify an employee for paid time off and health insurance had been increased. As will be discussed below, the Union was subsequently advised that the compilation document also contained contract proposals put forth by Respondent.[11]

6. The Second Bargaining Session –September 19, 2007

A bargaining session scheduled for August was cancelled by Jasinski. The parties next met on September 19. According to McCalla's notes, the mediator attended this session, as well.

The Union complained that it had been two months since the last session, and the Employer stated that the delay was due to the fact that the parties did not have a comprehensive agreement.

[11] The compilation agreement also provided for the following hourly minimum salary rages effective July 26, 2007: LPNs -$16.50, CNAs - $8.00, Recreation - $7.60 and Grade 1 - $7.00.

The parties referred to the compilation document which, by that time, had been the subject of discussion at negotiations for the other Omni facilities. Jasinski had prepared a version which highlighted most, but not all, of the Employer's proposals and distributed it at the meeting.[12] According to McCalla, the Union said that some of the departures could be more clearly understood to be so by reference to the KL Labor Group Agreement, (the KL Agreement) which was the Union's understanding of the most recent complete agreement between the parties.

The KL Agreement was a multi-employer agreement among several nursing home facilities and 1115 Nursing Home and Hospital Employees Union (Local 1115), predecessor to 1199NJ. This agreement ran from 1992 to 1996. During the course of the Omni negotiations, the parties disagreed as to whether this formed the underlying collective-bargaining agreement applicable to the Omni facilities. The Union took the position that it was.

When the Union raised the issue of the applibility of the KL Agreement at this negotiation session, Jasinski asserted that he did not know what the KL Agreement was, maintained that it was not a relevant document and stated that he was not using it to understand the parties' bargaining history. The Union asked that the Employer check its files to research the applicability of the document.[13]

The Union also asked the Employer to provide the remainder of the information it had sought in its April 25 letter. The Union also asked for production of the documents used to prepare the compilation document. The Union brought up the fact that the employee list which had been given to them showed more than 10 employees who were working regular hours and not receiving benefits, but were receiving the same pay as those with benefits, raising the related issue of whether the facility made use of no-frills employees. According to Saint Hilare, Jasinski did not want to discuss the issue, but Gold stated that he would look into it.

According to Jasinski, the Union brought up the issues of no-frills employees and agency usage at virtually every negotiation. Jasinski repeatedly told the Union that the facility did not have any no-frills employees and that it did not make use of agency personnel. Jasinski asserted that although the Union made general claims that his representations were not accurate, they never provided specific information which would enable the Employer to respond to their assertions.

Jasinski further testified that much of the time at this session was devoted to complaints by employee members of the bargaining committee that employees were not receiving benefits they were contractually entitled to, rather than substantive negotiations. He suggested that these matters would be more appropriately addressed in a separate meeting with management.

7. The Third Bargaining Session – October 10, 2007

[12] Jasinski had failed to highlight the Employer's proposal to eliminate daily overtime and change the formula by which benefit fund contributions would be calculated. It appears from the record that the Union took note of the change in the overtime provisions, but did not realize that the proposed formula for pension and other benefit fund contributions was different at this time.

[13] The document in question does not specifically refer to this facility and, by its terms, does not reference a list of covered nursing homes. Respondent further argues that the Union was unable to identify the constitutent members of the KL Labor Group.

By the time the parties met, the Union had prepared a comprehensive counter-proposal on the non-economic terms of the contract. As McCalla and Saint Hilare testified, the Union modified the language on some proposals, and deleted portions of others to more closely approach the position taken by the Employer in the parties' prior meetings, including the September 19 Harbor View discussion as well as a prior negotiation session held for Castle Hill in August. Saint Hilare walked through the proposal and pointed out the changes to the Employer. Among the subjects discussed were Union activity and communication, the number of Union delegates and days off, the discipline and discharge provision, the establishment of a health and safety committee and related provisions and probationary pay. According to both Saint Hilare and McCalla, Jasinski had little response to the Union's new proposals. As Jasinski testified, the Union's revised proposal was conditioned on the withdrawal of certain Employer proposals and he informed the Union that he would not agree to do that.

After a caucus, Respondent provided the Union with an economic proposal.[14] The Employer proposed raising life insurance coverage for employees from $10,000 to $15,000, annual wage increases ranging from 2 percent to 2.75 percent amounting to 13.75 percent over the five-year term of the contract, the establishment of 20 no-frills positions with the wage differential increased to $1.50 per hour and no change to its proposal on health insurance. The minimum wage rates effective July 26, 2007 were to be were raised to $18 for LPNs, $8.50 for CNAs, $8.25 for recreation employees and $7.75 for dietary and housekeeping employees, with two general wage increases of 2 percent to be added to the minimums during the term of the agreement.

8. The Union's October 19, 2007 Request for Information

On October 19, 2007, Saint Hilare wrote to Jasinski requesting information which had previously been requested, but which the Union felt had not been provided. In addition, the letter reflects certain requests that had been made directly at the bargaining table. As Saint Hilare wrote:

Dear Mr. Jasinski,

The Union has made several unsuccessful efforts to obtain from these employers information necessary to bargain contracts at Castle Hill, Palisades, Harbor View and Bristol Manor. The failure by these employers to produce requested documents has hampered our bargaining especially as we are finally beginning economic bargaining. The Union repeats its request for the following information for each of the four above referenced facilities:

1. For each employee working in a bargaining unit position such documents as will show the following:
a) Regular hours of work.
b) Number of overtime hours worked on a quarterly basis in 2006 and 2007.
c) Whether an employee is a no-frills employee.

2. Names of all agencies used by the Employer to provide temporary staff.

[14] At the outset of bargaining Jasinski had informed the Union that he preferred to negotiate non-economic terms prior to getting into specifics regarding economic matters. The Union, however, had previously asked Respondent to put forward an economic proposal.

3. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

4. Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

5. OSHA injury and illness records for 2005, 2006, and 2007.

6. Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

7. The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

8. Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

With respect to this last item, because the current Union and management negotiators did not participate in the negotiations of the prior contracts with these employers, we are both at a disadvantage in compiling a full set of contracts and MOAs for each facility. The documents that you handed us in bargaining that purportedly summarized the current terms and conditions of employment from prior agreements, were inaccurate. We therefore, reiterate our request for all contracts and MOAs between the parties since 1990 that are within the possession and control of your clients.

General Counsel adduced testimony from both McCalla and Saint Hilare about why such information had been requested.[15] In particular, the Union representatives testified that the Union sought information regarding regular work hours and overtime information because employees had complained that staffing was not sufficient and because the Employer had proposed eliminating daily overtime – a proposal which would impact unit employees. The number of no-frills employees related to bargaining over the issue of dependent health care coverage. Both McCalla and Saint Hilare testified that the employee rosters which had been provided by the Employer on June 1 and July 27 raised questions regarding the Employer's use of the no-frills classification since the list indicated that more than 10 employees (the allotted number of no-frills slots) who were eligible for health insurance did not receive such insurance or extra compensation for foregoing such benefits. This also called into question the accuracy of the employee rosters.

The second and third paragraphs requested information regarding the use of agencies to provide employees to perform bargaining unit work. Saint Hilare testified that the Union suspected that agency LPNs were being used based upon reports from employees.[16] McCalla

[15] I do not rely upon this testimony to establish what the Union representatives may or may not have told Respondent about why the information was being sought. Rather, I rely upon specific testimony about each bargaining session, the correspondence between the parties and, where applicable, bargaining notes.

[16] Jasinski acknowledged that Saint Hilare raised the issue with him at the bargaining table.

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testified that information regarding agency usage is relevant because agency employees are costly to the employer and the Union might want to consider whether some of the money spent on temporary staff might well be utliized to enhance the benefits of current employeesand that the use of agency employees erodes the bargaining unit.

The work schedules were requested primarily to investigate the adequacy of staffing at the facility as well as to see how many temporary workers were utilized in each unit. OSHA logs were sought to track whether there were health and safety issues to be addressed as well as to enable the Union to defend its proposals over those issues.

According to McCalla, the Medicaid cost reports were something "typically" requested. He stated that they were very valuable tools that the Union always obtains from employers heading into bargaining, and they are then turned over to Union researchers to examine. Such reports contain information regarding the ownership and management structure of the home, the census, staffing and the profitability of the facility. Although they are filed with, and may be obtained from the State, the most recent reports are often unavailable and are therefore sought from the facility itself.

The Union also requested per-employee premium cost for Employer-funded single health insurance. Although the Employer had previously provided information relating to the costs to employees for dependent coverage and the aggregate cost of employee coverage, it had not provided the Union with specific information about the costs of single employee coverage for individual employees. McCalla and Saint Hilare testified that this information was necessary to enable it to calculate the total cost for health insurance. In addition, the Union again requested copies of those documents which the Employer had used when preparing the compilation agreement.

9. Saint Hilare's November 9, 2007 Letter Regarding the Union's Information Request

On November 9, Saint Hilare sent the following letter to Jasinski:

The Union has made several unsucessful efforts to obtain from these employers information necessary to bargain contracts at Castle Hill, Palisades, Harbor View and Bristol Manor. The failure by these employers to produce requested documents has hampered our bargaining especially as we have finally begun economic bargaining.

I sent another request for this previously requested information to you on October 17, 2007. We have not received a respons. Please reference Our October 17, 2007 letter and supply the requested items. It is [in] the interests of both parties to conclude bargaining at the above referenced facilities as soon as possible. We would appreciate receiving the information before our next bargaining session for the above referenced facilties or by Wednesday, November 14, 2007 if we have not scheduled bargaining dates before then.[17]

Jasinski asserted that the looked into it but could not confirm that agency was being used at Harbor View. He offered no specific testimony as to what efforts he made to investigate this issue.

[17] It appears that the references to Saint Hilare's October 17 letter are in error, and that he was, in fact, referring to his October 19 letter and information request.

10. The Employer Proposes a Christmas Bonus and the Union Agrees

On December 12 and 13, 2007 the Employer wrote to the Union proposing a one-time holiday bonus for all full-time and part-time employees of $150 and $75 respectively. The Union voiced no objection to this, and eventually communicated its agreement with the proposal. The bonus was implemented prior to the Christmas holiday.

11. On January 29, 2008, Respondent Replies to the Union's October 19, 2007 Information Request

By letter dated January 29, 2008, Jasinski issued the following response to the Union's October 19, 2007 demand for information. The 2002 MOA and the KL Agreement were enclosed as well.[18]

As Jasinski wrote:

We are frustrated with the Union's current efforts to avoid meaningful contract negotiations. At the request of the Union, and in an effort to move the negotiations forward, we submitted a complete contract which set forth its understanding of the existing terms and conditions, as well as some limited modifications which we highlighted. Instead of showing your appreciation, the Union decided to file unfair labor practice charges alleging that I somehow misrepresented the terms of the prior contract. As you know, these allegations are patently false.

Early in these negotiations, the Employer provided the Union with all of the documents responsive to its information requests. Nonetheless, the Union did what it always does -- ask for additional information that is largely duplicative and/or irrelevant to the bargaining process. Your recent request for information further represents the Union's delay and bad faith tactics.

Nonetheless, in a further effort to move the negotiations forward, we respond to your additional request for information, dated October 19, 2007, as follows.

Request No. 1

For each employee working in a bargaining unit position such documents as will show the following:

- *a) Regular hours of work;*
- *b) Number of overtime hours worked on a quarterly basis in 2006 and 2007; and*
- *c) Whether an employee is a no-frills employee.*

Response to No. 1:

This information was already provided to the Union.

[18] The version of the KL Agreement enclosed by Respondent contains a handwritten notation at the top which reads: "Master Agreement" and lists the following facilities: Bristol, Harbor View, Castle Hill and Whitehall 3. There is no evidence, however, as to who may have made such notations or when they were made.

Request No. 2

Names of all agencies used by the Employer to provide temporary staff.

Response to No.2
The facility does not utilize any agencies to provide temporary staff.

Request No. 3

Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and the job title for each agency employee provided to the Employer during the periods January 1, 2006 through March 31, 2007.

Response to No. 3

The facility does not possess any such invoices.

Request No. 4

Copies of work schedules for each nursing unit and/or department for the months October through December 2006, and January through March 2007.

Response to No. 4

This information will be forwarded to the Union under a separate cover.

Request No. 5

OSHA injury and illness records for 2005, 2006, and 2007.

Response to No. 5

The facility does not possess such information. Furthermore, we fail to see how this information is relevant to the current negotiations.

Request No. 6

Complete copies of cost reports submitted, including any supplemental submissions, for reimbursement for Medicaid or for any other public entity or program for the years 2005 and 2006.

Response to No. 6

This information is readily available to the Union through the State. Indeed, as the Union has demonstrated in the past, you are already in possession of this information

Request No. 7

The per-employee monthly premium cost for Employer funded single health insurance coverage (requested verbally during bargaining).

Response to No. 7

This information was already provided to the Union.

Request No. 8

Copies of all collective bargaining agreements and memorandums of understanding/agreements including all documents that you used to compile the documents that were submitted across the table and characterized by you as the current contract at each of the above referenced facilities.

Response to No. 8

We find it particularly troublesome that you seek copies of prior contracts and MOAs negotiated by your Union. Nonetheless, we enclose the prior contracts and all memoranda of agreements in our possession and the documents provided by the Union during the negotiations, including the KL New Jersey labor Group Contract.

* * *

Jasinski continued:

We look forward to continuing our contract negotiations and fully anticipate that the Union will resume these negotiations in good faith. All we ever wanted was to negotiate a fair contract that balances the needs of the facility, our employees, and our residents. As you have demonstrated, you have been able to negotiate and make proposals. Avoid the game-playing that has scarred other negotiations. We are not interested in game-playing and only look for a contract that addresses the needs of our employees.

12. The Fourth Bargaining Session – February 12, 2008

At this session, the Union offered an economic counter-proposal. Its terms included a $400 signing bonus in lieu of retroactive pay, a 15 percent wage increase over the three-year term of the agreement, a reduction in the amount of the Employer's pension contribution from 3 percent to 2.5 percent. The proposal additionally provided that, by July 2010, the minimum salaries for CNAs and Grade 1 employees would reach $11 and $10 per hour, respectively.[19] Proposals were also made with regard to sick leave, holidays and pension percentage. The Union additionally suggested that the KL Agreement be used as the template for non-economic terms. Jasinski responded that the Union's proposed wage increases coupled with the increases in the minimum salaries would amount to a 25 percent wage increase in some cases, and rejected the proposal. The Employer then caucused.

Upon returning from the caucus, Jasinski announced that the Employer had put a forward a non-economic proposal in 2007 which remained on the table and that, unless the Union was prepared to give a counter-proposal, its non-economic proposals were final. The Union reminded Jasinski that it had put forward a non-economic counter-proposal at the October 10, 2007 session which had not been responded to. The Employer then presented an economic counter-offer which it characterized as close to its final offer. This proposal included a signing bonus of $100 and a total wage increase over the five-year contract term of 15.5

[19] Saint Hilare acknowledged that he told the Employer that the Union was seeking to achieve these minimum salaries in the contract, but also testified, without rebuttal, that at the time the "statewide" standard was higher than that.

percent. At the end of the contract, the minimum hourly salaries would be $20.50 for LPNs, $9.50 for CNAs, $9.00 for recreation employees and $8.75 for Grade 1 employees. The Employer further stated that it was at its final offer with regard to health insurance, proposed a two-tier system for paid sick leave and made other proposals regarding holiday and vacation pay.

The Union objected to the Employer's assertion of being close to its final position, pointing out that information was still outstanding on a variety of issues including health insurance, no-frills employees and the production of OSHA logs. Saint Hilare argued that the CNAs were reporting having to work double shifts and reiterated that the Union wanted overtime information for a fruitful discussion on the issue which, if it could be addressed, might produce additional money to put toward the agreement.

At some point there was a discussion of whether the facility was using agency LPNs. Saint Hilare stated that employees had told him that nurses were reporting for work but not returning and that this might be a sign that they were agency employees. Gold maintained that there was no agency usage at the facility, but when asked specifically about the LPNs, he replied that he would look into the issue.[20]

With regard to this negotiation generally, Respondent adduced the following testimony from Saint Hilare:

> Q: [by Respondent's counsel] Now the Union –the Employer's proposal that was submitted on February 12, 2008, that was an improvement of what it previously proposed, isn't that true?
>
> A: Yes
>
> Q: So as of February the 12th the Employer was going up, with regards to its economic proposal, isn't that right?
>
> A: Yes
>
> Q: And as of February the 12th, the Union was coming down with regards to what it was proposing, correct?
>
> A: Yes, yes.
>
> Q: So the parties were engaging in meaningful negotiations at that time, correct?
>
> A: Yes.

13. Saint Hilare's February 14, 2008 Response to Respondent's January 29 letter

On February 14, 2008, Saint Hilare responded to the letter sent by Jasinski on Janaury 29 and the information provided therein, as follows:

I am responding to the letters you faxed to the Union on January 29, 2008 referencing a

[20] There had been some initial confusion as to whether the Union represented LPNs at the facility, but it appears to have been resolved well prior to this point in the bargaining.

request for information relevant to negotiating collective bargaining agreements at the above referenced facilities that I sent you on October 19, 2008. While you sent four separate letters for each of the facilities in question, your statements were identical in each letter so I will take the liberty to respond to all of the assertions you raised in one document.

The Union shares your frustration at the lack of progress at these negotiations though we take issue with many of the assertions in your letters. To start, the "complete contract" you submitted at each negotiation was not a faithful representation of the existing terms between the parties and you did not indicate or state that it included "highlighted modifications" when you provided the document. The changes you inserted were subsequently highlighted only after we brought them to your attention at bargaining. Further, you did not provide "all the documents responsive to ... information requests". We have raised the issue of lack of compliance with our information requests both in writing and at multiple bargaining sessions for the above referenced facilities. I will respond to your letter in the format you used. Each response represents our understanding for each of the above referenced facilities.

<u>Request 1</u>

1. We have not received information on overtime hours.
2. We have not received a list of no-frills employees. Contrary to your claims, we cannot determine from information provided which employees are no-frills.

<u>Request 2 and 3</u>

Information from our members disputes the assertion that no agency CNAs are being used in the above referenced facilities.

<u>Request 4</u>

As I advised you on February 7, 2007 we have yet to receive the copies of work schedules for the above referenced facilities promised in your January 29, 2008 letter.

<u>Request 5</u>

We find it hard to believe that the facilities do not keep OSHA logs. It is my understanding that nursing homes need to keep these records. The Union has made proposals for improved health and safety standards that would be informed by this information which reflects employee injuries and illnesses.

<u>Request 6</u>

We understand but do not agree with your position that you need not provide Medicaid costs reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available.

<u>Request 7</u>

You provided only the cumulative cost for single health insurance coverage for everyone in the above referenced facilities, not the monthly per employee premium cost to each of the four employers. That vital piece of information cannot be accurately computed from

the information we received. We cannot simply divide the cumulative total by the number of employees to determine the cost because the number of employees fluctuates from month to month. We do not understand why you refuse to simply provide this readily accessible monthly premium information.

Request 8

We finally received the MOAs and contracts as you promised in your January 29, 2008 letter. We are pleased to receive this information so that we can confirm past practices and benefits and bargain intelligently over the issues. We note that at least one of the KL Labor Group contracts you sent us is not a document we had and gave to you during bargaining. We presume that it is a document that the employer had in its possession and recognized as part of the bargaining history between the parties. If that is incorrect, please let me know.

The Union also looks forward to returning to negotiations and concluding collective bargaining agreements that address the legitimate needs of our members as well as the needs of the residents and operators of the facilities.

14. Respondent Replies to Saint Hilare's February 14, 2008 Letter

On February 20, 2008, Jasinski responded to the assertions contained in Saint Hilare's letter, as set forth below:

We have reviewed your letter dated February 14, 2008 combining all facilities and continue to be perplexed by your actions. Instead of focusing your attention on negotiating a contract in the best interests of your members, you persist with your requests for information entirely irrelevant to the bargaining process.

As we advised you, we will provide copies of the work schedules under separate cover. Otherwise, we have fully complied with the Act by providing the Union with all the information necessary to negotiate. We continue to assert that this information is unnecessary, irrelevant and already in the Union's possession. Your request for irrelevant information further represents the Union's delay tactics and abuse of the process. One needs to look no further than the Union's ability to put forth full comprehensive economic offers with the information we have already provided to you.

Additionally, we have repeatedly told you at the bargaining table that the KL Labor Group contracts have no relevance to these negotiations. Contrary to your self-serving statements, we do not recognize that these documents are part of the bargaining history of the parties.

It is time for you to stop playing games and focus on negotiating a contract in good faith. If it is your position that the Union will not return to the bargaining table without this information, please let us know. If that is the case, we respectfully request that you have the decency to inform your members of the reasons that the parties are not meeting. We do not want any misunderstanding or miscommunications on this point. Otherwise, we intend on going forward with the scheduled sessions in a good faith effort to reach an amicable resolution that balances the needs of this facility with that of the employees.

Finally, by combining all the facilities in your letter, you continue to disregard our position

that each facility is separate and stand alone. In the future, please address each facility separately, since each facility has its own collective bargaining agreement.

15. The Fifth Bargaining Session – February 25, 2008

As Saint Hilare testified, the Union raised the issue of health insurance at this meeting. He said that a serious discussion was needed, but that first the Union needed to understand the costs to the Employer and that the no-frills information was needed to enable the Union to assess exactly how many employees required coverage. He also stated that information was necessary for overtime because the Union needed it to assess the potential impact on the unit of the Employer's proposal to eliminate daily overtime.

The Union also responded to the Employer's economic proposal. It moved from three-year to four-year agreement and reduced the signing bonus to $350. The proposed agreement would result in hourly minimum salaries of $23 for LPNs, $10 for dietary employees, $11 for CNAs and $10.20 for recreation employees effective as of March 2011. In addition, the Union made a revised health insurance proposal whereby the Employer would not be required to make full payment for dependent coverage until an employee had completed 10 years of service. For the first five years of employment, the employee would assume the cost of dependent coverage. After this point, the Employer would assume 50 percent of the cost and the share of the Employer's burden would increase by 10 percent each year until the employee had completed ten years of service.

With regard to this meeting, Jasinski testified that the Union's only response to the Employer's non-economic proposals was its continued insistence that the KL Agreement govern such terms. The Union remained adamant on its insistence that the overtime provisions of the 2002 MOA remain as is, and it never had any response to the Employer's management rights proposal.

After hearing the Union's economic proposal, the Employer presented a modified economic proposal which provided for an increase in wages. The allowable number of no-frills employees remained at 20 who would be paid an additional $1.50 per hour. The Employer had previously proposed a two-tier benefits package whereby benefits for new hires would be reduced and there was discussion of this issue. There was discussion of the percentage of pension contributions, but no discussion of the formula by which such contributions were to be computed.

At the conclusion of this meeting, Jasinski told that Union that the Employer was very close to its final offer.

16. Respondent's February 27, 2008 Letter to the Union, and the Employer's Memorandum to its Employees

Prior to February 27, 2008, the Union sent the Employer a notice that it was going to conduct informational picketing at Harbor View on Friday, March 7, 2008, commencing at 2:00 pm and concluding at 4:30 pm. In response, Jasinski wrote to Saint Hilare on February 27, providing that "[u]nder no circumstances will the Administration and the Facility tolerate any activity that in any way impedes, blocks, disrupts or hampers the patient-care services that the facility provides to the residents" and further stated that employees who walk off the job during their regular work hours would be disciplined.

On that date, Harbor View administration issued a memorandum to its employees

addressing the issue of the informational picket, entitled "Status of Contract Negotiations." The memo advises employees that it is "taking this action seriously and preparing itself in the event our employees opt to take further serious action that includes abandoning their jobs and walking off the job. The Administration has been forced to take necessary steps, including retention of temporary workers, security and other actions, all designed to ensure continued quality care and uninterrupted services to our residents in the event the employees opt to support the Union's efforts." The memorandum goes on to discuss management's position concerning the ongoing contract negotiations.

There is no evidence that whatever picketing may have taken place at the appointed day and time resulted in any employee abandonment of their duties or other disruption to Harbor View operations. Similarly, there is no specific evidence that any agency was retained to, or did, provide temporary workers during the two and one-half hours of picketing on that day.

17. The Sixth Bargaining Session – March 5, 2008

At the outset of this meeting, Jasinski accused the Union of drawing out the process, stating that it had objectives in mind other than the goodwill of its members. Jasinski stated that the Employer was going to discuss its final proposal, and proceeded to do so. It appears from McCalla's bargaining notes that there was a comprehensive discussion of the economic and non-economic proposals of the Employer's final offer, and that this dominated the majority of the session. The Union representatives took a considerable amount of time asking questions about the Employer's final offer.

The Union representatives also stated that they did not believe the process was over and that they still had moves to make. They protested that, at the Harbor View table, there had not to date been a discussion of the Union's October non-economic counter proposal. They suggested that such a dialogue occur, and the parties then did have discussion of certain aspects of the proposal; in particular the probationary period, union activity and communications and paid time off for union representatives. The Union was told that the Employer would not enter into a discussion of proposals regarding staffing, meals and the increase in the number of available mechanical devices to assist employees in lifting patients. In this regard, McCalla again raised the issue of the OSHA logs. Saint Hilare raised certain "shop issues" inquiring for example, if it was really necessary for the Union to obtain written permission prior to investigating emergencies.

At this point, according to McCalla, Gold stated that he would have to leave the meeting and it drew to a conclusion. Saint Hilare stated that the Union would analyze the Employer's final offer and prepare a counter-proposal.

18. A Subsequent Meeting Is Cancelled by the Union

The parties had scheduled another meeting for March 18, 2008. On March 17, Saint Hilare sent a letter to facility administrator Woodard to confirm the release of the bargaining committee. During a visit to the facility later that day, Woodard informed Saint Hilare that, due to the late receipt of his request, and the scheduling difficulties it presented, he could not release the bargaining committee. Saint Hilare contacted Jasinski and told him that the Union would not bargain if most of the committee was not released. Jasinski stated that he would contact Woodard and apprise Saint Hilare of the situation by the end of the day. Jasinski did not contact Saint Hilare on that day, and due to the fact that Saint Hilare had been informed that the bargaining committee would not be released to attend negotiations, he called the mediator and cancelled the session. By letter dated March 31, 2008, Jasinski wrote to Saint Hilare confirming

that negotiations had been cancelled at his request.

19. Respondent Implements its Final Offer

On March 27, 2008, Jasinski wrote to Saint Hilare as follows:

Since the Union cancelled the last bargaining session and has not scheduled another session for Harborview, the Union has left us with no choice and we have decided to implement our last and best final offer effective April 1, 2008.

This final offer was the culmination of many contract negotiation sessions. At the last face-to-face bargaining session we presented to you our final offer which represented more than we were prepared to provide, and we confirmed at the table there was nothing more for us to give. Attached please find a copy of a letter sent to the employees with the final offer provided to the union at the last bargaining session.

If *you wish to discuss any particular matter, we have no objection to meeting with you.*

Attached was Respondent's final offer, as follows:

Final Offer

TERM: Five (5) years, to be effective upon ratification by members.

ELIGIBILITY: Employees who are regularly scheduled and work thirty (30) hours or more per week shall receive full benefits. The working time shall be defined as per the Employer's Workweek proposal.

Employees who are regularly scheduled and work twenty (20) hours and less than thirty (30) hours shall receive benefits on a prorata basis. The working time shall be defined as per the Employer's Workweek proposal.

EMPLOYEES EMPLOYED PRIOR TO RATIFICATION SHALL RECEIVE THE FOLLOWING BENEFITS:

HOLIDAYS: -Eight (8) designated holidays
An additional holiday: Good Friday after ten (10) years of service
- Employee's birthday
-One (1) personal day
-One (1) additional personal day after five (5) years of continuous service

SICK DAYS: Nine (9) sick days

VACATION: CNAs, Dietary and Housekeeping and Recreational Aides
Five (5) paid days - Upon completion of one (1) year of continuous employment.
Ten (10) paid days – Upon completion of two (2) years of continuous employment.
Fifteen (15) paid days – Upon completion of five (5) years of continuous employment.
Seventeen (17) paid days – Upon completion of fifteen (15) years

of continuous employment.
Seventeen paid days – Upon completion of twenty (20) years of continuous employment.

LPNs – Same vacation schedule as employees currently enjoy.

HEALTH INSURANCE:
As provided by the Employer. See attached

PENSION: *Two percent (2%) of all eligible full-time covered employees' wages for hours physically worked, as defined in the Employer's Pension Article. See attached.*

SIGNING BONUS: *$150.00 - Full time employees*
$75.00 - Part time employees

NO FRILLS: *Increase No-frills rate to $2.00 per hour above the minimum in the job classification.*
Increase to 20 no-frills positions.

WAGES: Upon ratification or implementation by the Employer: three percent general (3%)

12 months after ratification:	*two percent general (2 %)*
18 months after ratification:	*two percent general (2%)*
24 months after ratification:	*three percent general (3%)*
36 months after ratification:	*two percent general (2%).*
42 months after ratification:	*two percent general (2%)*
48 months after ratification:	*three percent general (3%)*

Increases shall not be added to minimums.

***New Minimum hiring rates as follows**:*

	CNAs	Grade 1	Recreational Aides	LPNs
Upon Ratification	8.50	8.00	8.00	19.00
24 Months After Ratification	9.00	8.50	8.50	20.00
48 Months After Ratification	9.75	9.00	9.00	21.00

Employees shall receive the increase to the new minimum or the general increase whichever is greater.

20. The Union's March 28, 2008 Response to the Final Offer

By letter dated March 28, 2008, Saint Hilare advised Jasinski that it had been the refusal to release the bargaining committee members that had prompted him to cancel the session. He further stated:

On March 18, the mediator offered April 8 or 9 at 10am to continue bargaining. Please let me know as soon as possible if either of those dates is acceptable.

Regarding your "final offer," let me be clear that the parties are no where near impasse. We had prepared a counter proposal to present on March 18 that addressed both non-economic language items and economics. Further we continue to await the receipt of information, especially health insurance information, so that we can have a more meaningful discussion of the issue. To date, we don't even know the health insurance premium monthly cost. I addition, the parties are still in discussion over what contract language is currently in effect, given the lack of clarity regarding all the MOAs and the earlier contract. Indeed, it is not clear from your "final offer" what underlying contract language you are using.

We also have a number of questions about your offer. For example, what workweek proposal do you refer to? What do you mean by "same as other employees" for new hires? Which employees? And what benefits do those employees have? The health insurance, pension and training attachments were not provided with your final offer.

The Union requests that you return to the bargaining table and comply with your duty to bargain in good faith. I am hopeful that the parties can reach an agreement that is fair to all. If you are not available to bargain on April 8 or 9, please offer alternative dates.

21. On April 1, 2008, Respondent Provides Additional Information to the Union

On April 1, 2008, Jasinski wrote to Saint Hilare as follows:

We provide you with the following information:

1. Amount of overtime for the previous year varied each week based on a number of factors including call-outs and unavailability of staff. Nevertheless, it is fair to estimate that overtime hours typically ranges from 100-300 hours per week over the previous year.

2. Number of no-frills employees: 0

3. Agency Usage: None

4. OSHA: See attached [21]

5. Monthly insurance premiums:
289 Single
526 E+1
647 Family

As we have previously stated across the table, nothing has prevented the Union from engaging in negotiations. To the contrary, the Union has made proposals and counterproposals including a comprehensive contract proposal. Upon receipt and review, if you have any additional questions or comments, we respectfully request that you respond in writing.

[21] Enclosed was the OSHA log for 2007.

22. The Union's Response to Respondent's April 1, 2008 Letter and Submission

On April 10, Saint Hilare responded as follows:

I am responding to your April 1, 2008 letters regarding the Union's outstanding request for bargaining information. While you sent four separate letters for each of the facilities in question, your statements were almost identical for each facility. Unless otherwise indicated, my comments below relate to all four facilities. I note that you did not provide information for Palisades other than 2007 OSHA log.

Request 1: Your response to the Union's request for overtime information is inadequate. You state, "it is fair to estimate" for all four facilities that overtime hours "typically range from 100-300 hours per week over the previous year." The Union requested the number of overtime hours worked on a quarterly basis in 2006 and 2007 for each bargaining unit employee. Your generalized estimate is not sufficient.

You provided contradictory information on the number of no-frills employees.[22]

Requests 2 and 3: You continue to deny that the facilities use agency workers.

Request 4: No schedules were provided.

Request 5: After all these months, you finally produced OSHA logs for 2007 on April 1, 2008. You did not produce logs for 2005 and 2006.

Request 6: No documents provided.

Request 7: Thank you for finally providing the monthly insurance premiums in your April 1, 2008 letter.

The piecemeal fashion in which the information has been provided and the failure to provide all the information requested, even these many months later, has made these negotiations particularly difficult. Now that we have information regarding health insurance and health and safety, we will provide you with revised proposals at our next bargaining sessions at all four facilities. Once we receive the remaining information, we will present further proposals.

23. Respondent's April 22, 2008 Response to the Union's April 10 Letter

On April 22, 2008, Jasinski replied to Saint Hilare's April 9 letter as follows:

We are in receipt of your letter dated April 9th. At the inception of these negotiations, the Employer provided the Union with a complete response to the Union's request for information. Nonetheless, on April 1, 2008, we provided a supplemental response in response to information requested by you. Instead of expressing appreciation, you claim that the failure to provide the Union with additional information - which is largely irrelevant, not in our possession, and/or easily ascertainable - has made these

[22] This is an apparent reference to confusion caused by another letter indicating that one of the Omni facilities, either Harbor View or Palisade, had four no-frills employees.

negotiations difficult.

Let's be clear. The parties have been negotiating for months. As we previously stated across the bargaining table and in prior correspondence, the Union has been fully capable of putting forth full economic proposals and counterproposals. Indeed, you have made proposals covering every economic item. The additional information being sought is neither relevant nor necessary to continue bargaining. Rather, it reflects the Union's delay and stall tactics and its warped purpose of avoiding a contract that addresses this facility.

As always, we are fully prepared to continue negotiating in good faith. Nonetheless, if the Union is unwilling to continue bargaining without the rest of the requested information, please let us know. Otherwise, the Union should be prepared to negotiate a contract that balances the needs of this facility and its employees.

Thank you.

24. Subsequent Communications from the Employer

On May 8, 2008, Jasinski wrote to Saint Hilare demanding that, inasmuch as the Union had requested the involvement of the FMCS in the negotiations, "any and all communications regarding this negotiation be conveyed through Mr. James Kinney" including proposing dates for negotiations.

On May 19, 2008, Respondent sent an updated employee list of Harbor View employees to the Union. Although no no-frills employees were noted, there were approximately 31 employees listed who did not appear to have health insurance.

On May 28, 2005, Jasinski wrote to Saint Hilare enclosing the 2005 and 2006 OSHA logs and the 2005 and 2006 Medicaid cost reports. Also provided were "total overtime hours by quarter for 2006 and 2007" as well as employee schedules for the (1) dietary department for the period from December 30, 2007 to May 3, 2008; (2) housekeeping department for the period from December 23, 2007 to April 26, 2008 and (3) for the nursing department for the period December 23, 2007 to April 12, 2008. With respect to the issue of agency usage, Jasinski wrote: "there were no agency personnel used by this facility in the requested time period."

In this letter, Jasinski further asserted: "We continued to await dates for continued negotiations at this facility."

25. The Union's June 10, 2008 Response to the Employer's May 28 Letter

On June 10, Saint Hilare sent Jasinski the following reply to his May 28 letter and the information provided therein:

We received the information accompanying your May 28, 2008 letter. As you know, we have been seeking this information since April 25, 2007. Your piecemeal production has greatly impaired our ability to bargain. Further, the information you provided still is not complete.

I must also point out that since early April, 2008 at Castle Hill bargaining, I requested updated information for all four facilities. With respect to the documents produced with your May 28, 2008 letter, the production remains incomplete.

1. Overtime hours: You did not provide overtime hours for each employee as requested for any of the four facilities. Rather, you provided a total quarterly amount for all employees, presumably across all bargaining unit job titles for 2006 and 2007. Given the employer's proposal on the elimination of daily overtime, the receipt of this information is necessary.

At the April, 2008 session at Castle Hill, we questioned you about your response to our request for overtime information. We told you the information was necessary given your daily overtime proposal. You replied that the rough estimate you provided was all that you had to give us. We need the overtime information for June 1, 2007 through May 31, 2008, as well as for the period stated in the April 25, 2007 request. We also need it in the form described in our April 25, 2007 letter, i.e., on a quarterly basis for each employee.

2. OSHA reports: none were provided for 2005 at Harborview.

3. Cost Reports: It does not appear that you provided the complete and final reports as the copies provided did not contain Schedule H, the provider's certification. In addition, other pages were missing from the 2006 and 2005 reports for Castle Hill. In my February 14, 2008 letter I also asked you to provide the 2007 reports as soon as they are prepared by your clients; to date, no 2007 reports have been provided.

4. Schedules: The schedules you provided do not show all individuals who were actually working on the floors. There are daily schedules in nursing which show on a single page all individuals who actually work on all shifts on all units. Please provide the daily schedules for February 1, 2008 through the present. In addition, the LPN schedules for Harborview were provided only for one month and not even all shifts for that month. Finally, only about four months of schedules were provided for each of the four facilities.

5. Agency information: You stated in your May 28, 2008 letter that "there were no agency personnel used by this facility in the requested time period." What do you mean by requested time period? In your previous correspondence and at bargaining, you claimed that none of the facilities used agency workers. Are you now saying that agency workers have been or are being used since March 2007? If so, please provide the information regarding agency usage, as requested paragraphs 8 and 9 in my April 25, 2007 information letter for all four facilities during the period from March 2007 to the present time.

6. No-frills: You have not clarified the contradictory information provided to us on April 1, 2008.

Thank you for your anticipated cooperation.

26. Respondent's June 17, 2008 Response to the Union's June 10 Letter

On June 17, 2008, Jasinski wrote to Saint Hilare in response to the assertions made in his June 10 correspondence:

We are puzzled by your June 10th response to the information we provided with our May 28th letter. In our letter, we informed you that we have provided you with all of the information in our possession. Yet, you insist that our production somehow "remains

incomplete."

Now,more than ever, it is readily apparent that the Union has absolutely no interest in using any of this information for legitimate purposes at the bargaining table. Rather, the Union's strategy is transparent - to use these information requests to avoid real bargaining and to try to avoid reaching impasse. Instead of continuing your bad faith conduct by putting forth irrelevant and harassing information requests, I suggest that you refocus your energies to engage in meaningful bargaining so that the parties can reach a contract for the benefit of our employees.

We respond to your specific allegations as follows:

1. The approximate average overtime worked per employee are as follows:

1st Quarter 2006 - 38 hrs
2nd Quarter 2006 - 41 hrs
3rd Quarter 2006 - 59 hrs
4th Quarter 2006 - 60 hrs

1st Quarter 2007 - 44 hrs
2nd Quarter 2007 - 60 hrs
3rd Quarter 2007 - 59 hrs
4th Quarter 2007 - 70 hrs

Moreover, contrary to your assertion, our proposal was not to eliminate overtime. To the contrary, all bargaining unit employees will continue to be paid overtime compensation on a weekly basis. We stated this at the bargaining table. You have failed to provide any specifics that any employee would be hurt by our proposal.

2. We previously provided you with a copy of the 2005 OSHA report. An additional copy is enclosed for your convenience.

3. We provided you with the 2005 and 2006 cost reports in their entirety. We provided you with these cost reports even though they are typically not considered to be relevant in negotiations, and you have not demonstrated any need for these documents. Troy Hills Nursing Home, 326 NLRB 1465, n.2 (1998). We are uncertain what "Schedule H" is or what possible relevance a provider's certification has to the negotiations. Accordingly, please provide us with the specific reasons why you consider such information relevant to the bargaining.

4. We provided you with all the schedules in our possession. We cannot provide them in a form which does not exist.

5. This facility did not utilize agency personnel from March 2007 through the present.

6. Harborview does not have any employees in the no-frills category.

We recognize that you are currently away on vacation and will be unable to schedule any contract negotiations for the rest of the month. We suggest that you propose dates in July and August that will not conflict with your schedule.

Thank you.

27. Respondent's June 23, 2008 Letter

On June 23, 2008, Jasinski sent Saint Hilare the following letter:

Mr. James Kenney[23] *contacted me concering negotiations to obtain the status of negotiations and offered his services to schedule a meeting. I joined in the request and expressed our willingness to meet if he thought it would be beneficial.*

Unfortunately, you have not contacted us for a number of weeks. We have no desire in prolonging this negotiation longer than necessary. It is now almost one (1) year since the contract expires and after numerous bargaining sessions, we submitted our last, best and final offer nearly three (3) months ago. If you are interested in meeting, I suggest you contact Mr. Kenney who will propose dates for the meeting. Thank you.

28. The Union's July 7, 2008 Response to Respondent's June 17 and June 23, 2008 Letters

I just returned from vacation this week and reviewed your June 17 and June 23 letters, which arrived while I was away.

The comment in your June 23 letter that you are puzzled that the Union has not contacted you or Mediatory Kenney regarding bargaining in the past several weeks is a puzzling comment to me as you knew I was away from the office and on vacation for most of the month. Further, I have no clue what you mean in your June 23 Bristol Manor letter that the Union brought up subjects that had nothing to do with contract negotiations.

In any event, I have reached out to Mr. Kenney and we are both available to meet on several dates in July and August. Given that we have not met at Harborview and Bristol Manor, I suggest we take the earliest date for those facilities. I there fore propose July 15 for Bristol Manor, July 16 for Harborview and July 17 for Castle Hill and in addition, we are also available for July 21 and July 22, 2008.

Regarding the Union's outstanding information requests:

1. We have repeatedly explained to you that we need overtime information for each individual employee. This is especially necessary given your very harsh proposal to eliminate daily overtime. Once we review which employees work overtime, we can investigate with the employee how much of that is daily overtime. Of course, if you have daily overtime records for each employee, that would make our task a lot easier. Please not that in my June 10, 2008 letter I also asked you to provide updated overtime information through May 31, 2008.

2. Regarding the Schedule "H" of the Medicaid Cost Report, we simply wanted the complete document, containing the provider's signature and date. Have the 2007 Cost Reports been filed yet? If so, please provide copies as previously requested.

[23] From time to time the mediator is referred to the parties as "Kinney" and at other as "Kenney."

3. Schedules: I precisely described in my June 10, 2008 letter the daily schedules in nursing which show on a single page all CNAs working on all shifts and floors. In addition, I remind you of the missing schedules at Harbor View. You provided LPN schedules only for March and April 2008. In your June 17 letters, you state that you provided all the schedules in your possession. Certainly, your clients possess May 2008 schedules that were not provided for nursing at any facility other than Palisades. And had you complied with our July 2007 information request prior to May 28, 2008, more schedules would have been produced.

4. Thank you for clarifying the no-frills information for Palisades. As previously requested, please give us the names of those four no-frills employees.

Please provide the outstanding information and let me know which dates you are available for bargaining.

29. The Union's July 23, 2008 Updated Request for Information

On July 23, 2008, Saint Hilare wrote to Jasinski asking for information regarding agency usage and requesting further bargaining. His letter is as follows:

I am writing to follow-up our discussion on July 17, 2008 during the Castle Hill bargaining regarding information on agency workers as well as the number of employees who do not have health insurance coverage. As explained, the Union will need to formulate proposals. This letter also is a follow-up to the July 7, 2008 regarding the Union's outstanding information requests for Bristol Manor, Castle Hill and Harborview bargaining

At the Castle Hill bargaining on July 17, 2007, employer conceded after having repeatedly denied using agency workers, that agency workers have, in fact, been in used at Castle Hill to provide temporary staff. Based on that, the Union requests:

1. Names of all agencies used by the employer to provide temporary staff;

2. Copies of invoices received from each agency showing the names, number of hours worked, rate(s) billed and job title for each agency employee provided to the employer during the periods January 1, 2008 through July 22, 2008.

3. At bargaining, Castle Hill also agreed to provide a seniority list of the employees with explanation on why some employees who are working the required number of hours do not have health insurance coverage. You recall that at that session, the Union provided a list of names with question mark beside names for employees who do not have health insurance coverage.

Please provide the information listed above as well as the outstanding information described in my July 7 letter. Please also let me know which dates you are available to bargain for Castle Hill, Harborview and Bristol Manor.

There is no evidence that the Employer responded to this letter or otherwise provided the Union with additional information prior to August 2009.

30. Stipulations and other Evidence as to Changes in Employees' Terms and Conditions of Employment

The parties entered into certain stipulations regarding changes to employees' terms and conditions of employment as a result of Respondent's implementation of its final offer on or about April 1, 2008. In particular, the parties stipulated that prior to the implementation of the final offer employees were paid overtime pay for hours worked in excess of 7.5 hours per day. After the implementation of the final offer, the Employer ceased paying daily overtime to its employees. In addition, there was a partial implementation of a $3 uniform allowance on or about April 1. With regard to health insurance, prior to the implementation of the April 2008 final offer, employees who were regularly scheduled to work and worked 20 or more hours per week qualified for health insurance. After the implementation of the final offer, employees working more than 20 but less than 30 hours per week are no longer eligible to receive health insurance. In addition, Jasinski testified that, other than the formula used to compute the amount of contributions to the pension fund, Respondent has implemented the terms of its final offer at Harbor View.

31. Bargaining Resumes in August 2009

As noted above, employees at Harbor View and the other Omni facilities engaged in a three-day strike in August 2009.[24] A meeting between Employer and Union representatives was scheduled for September 8. On August 21, 2009, Jasinski sent a letter to McCalla including updated information regarding the costs for health insurance coverage including single, employee plus one and family coverage.

On August 24, 2009, the following letter and enclosed information was sent to Union counsel Ellen Dichner:

> *This letter supplements the latest information request made by the Union. The facility has not utilized any agency personnel. With regard to overtime, each facility has provided overtime distribution information, reported by quarter and overtime usage per employees. Distribution of overtime corresponds to the needs of the facility and the request by employees for overtime work. The long-standing policy regarding overtime and the distribution of same complies with the terms and conditions as set forth under the expired collective bargaining agreement.*
>
> *With this additional information, we believe that we are fully responsive to the Union's requested information, and look forward to the Union's complete proposal at the next scheduled bargaining session.*

Enclosed with this letter was information relating to overtime (which was broken down per employee, per quarter for 2008 and the first two quarters of 2009), no-frills employees, updated gross payroll figures and work schedules. The information sent showed that approximately 28 employees who appeared to qualify for health insurance were not receiving it. Twelve employees were designated as no-frills employees.

32. The September 8, 2009 Meeting

[24] Jasinski was asked on cross-examination if he had ever heard of an agency called Tri-State Health Services. He testified that, with regards to Harbor View, he first heard a reference to this agency in connection with the August 2009 job action.

The negotiators at this meeting differed somewhat from the parties' prior meetings. Saint Hilare had been reassigned and was not present. The Union was represented primarily by its attorney Ellen Dichner and McCalla. Jasinski and Gold were assisted by another attorney, James McGovern. The mediator attended, as well.

Dichner made a presentation regarding the issues that separated the parties in terms of language, and McCalla made a similar presentation with respect to economic matters. The Union provided the Employer with a written contract proposal. There was a discussion of the proposal and then the Employer asked to caucus.

After the caucus, according to McCalla, Gold made a presentation. He advised the Union that the Employer would consider some form of dependent coverage for its employees. As McCalla testified, Gold stated that the Union's formula was too expensive, but that the concept of rewarding senior workers with some offset toward such a benefit was something the Employer would entertain. Gold stated that he would have his actuaries look into the matter.The Employer further indicated some flexibility with regard to wages and pension computation language. The Union inquired as to whether the Employer was willing to continue bargaining and the Employer stated that there was work to do away from the table but that the parties would contact each other and arrange further dates.

B. *The Alleged Failure to Remit Pension Contributions*

1. The Amendment to the Complaint

The charge in Case No. 22-CA-28151, as originally filed on December 3, 2007, alleges, in relevant part, that: "Since in or about July, 2007, the above named Employer through its officers, agents and representative David Jasinski has failed and refused to furnish information to the Union necessary to collective bargaining negotiations."[25]

On April 9, 2009, the Union amended that charge to add the following allegation: "Since in or about July 2007, the above-named Employer unilaterally failed to make pension fund contributions without notifying or bargaining with the Union." The regional office mailed the amended charge to the Respondent and its counsel of record on April 10, the following day. Following an investigation, on September 3, 2009, Counsel for the General Counsel issued a notice of intention to amend the complaint to allege that since on or about February 1, 2007, the Respondent unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union, and so moved at the opening of the hearing.

Respondent objected to the proposed amendment, arguing that it was barred by the Section 10(b) statute of limitations and that it was predicated on a different theory from the original charge. Respondent additionally denies the material allegations of the amendment. In its brief, Respondent raises certain additional defenses to the proposed amendment. In particular, Respondent argues that only the SEIU National Industry Pension Fund (the Fund) has standing to raise such a claim and that the Fund is neither a party to the charge nor to the collective-bargaining agreement. In this regard, the Respondent argues that the Union has no right to raise this claim on behalf of the Fund. Respondent further argues that any claim of such

[25] There is another allegation, contained in the charge as filed in December 2007, that the Employer falsely presented to the Union a document purporting to represent existing terms and conditions of employment, which is not a subject of the instant complaint.

an alleged violation would be covered by the grievance procedure under the applicable collective-bargaining agreement, and notes that no such grievance or lawsuit was ever filed by the Union.

At the hearing, I reserved ruling on the motion to amend the complaint to include this additional allegation. As has been noted above, it is hereby granted. See generally, *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774 (1997); Board Rules and Regulations Section 102.35(a)(8)(administrative law judge in an unfair labor practice case has authority, on the motion of any party, to order proceedings consolidated or severed).

The evidence adduced with respect to this allegation consisted primarily of the testimony of Betsy Blount, who has been employed by the Fund since 2000 in various positions, together with certain documentary evidence which was maintained in the Fund's files, as will be discussed below.[26]

2. Background

By letter dated November 22, 2002, the Union's then-attorney, Richard M. Greenspan, forwarded to the Fund a copy of the pension appendix executed by the parties in conjunction with the 2002 MOA. Beginning in about August 2002, contributions were remitted. However, payments for employees of Respondent were made by three entities. Harbor View made, and apparently has continued to remit, contributions for the dietary employees of the facility. It is undisputed that contributions for the certified nurses aides were drawn on the checks of an entity called Healthcare Staffing & Consultants, LLC (Healthcare). Similarly, contributions on behalf of the recreation employees were drawn on the checks of Sunshine Recreation, LLC (Sunshine). [27]

Some four years later, on November 5, 2006, SEIU international representative Larry Alcoff sent an e-mail to Fund collections manager Jack Salm about remittances for the Omni employees:

> *Jack,*
>
> *I want to follow up on the list of pension issues in NJ that we discussed on the phone last week:*
>
> *Omni Mgmt group (Castle Hill, Bristol Manor, Palisades and Harborview) -The Employer is a party to 4 separate CBA's with the Union. The Employer has made contributions for the past 4 years pursuant to those CBA's; however the Pension Fund failed to deposit those checks. The Employer provided a letter to the Pension Fund over 1 year ago stating that the nursing homes were the parties to the agreement and the Employer. The Pension contributions were made by their contracted payroll operations. We requested that the Pension Fund deposit all checks and give members appropriate service and vesting credit.*

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[26] With the exception of one document which Respondent sought to introduce into the record, which is discussed below, the testimonial and documentary evidence relating to this allegation of the compliant was adduced in a proceeding involving Castle Hill Health Care Center, Case Nos. 22-CA-28152 and 22-CA-28548. The parties stipulated the testimony and documentary evidence into the record herein.

[27] The record is silent with regard to contributions made on behalf of the LPNs.

We have not received any reports or copied correspondence (whether to the Employers or legal documents) to date. Please reply.

On November 8, 2006, Sahm replied to Alcoff's e-mail with the following inquiries:

In item three of your e-mail, you mention Omni Management Group. The checks we have are from Healthcare Staffing & Consultants LLC and Sunshine Recreation, LLC. A couple of questions-

1. *Who are the CBA's with – Omni Management Group or the individual properties?*
2. *Please forward copies of the four (4) CBA's that you mentioned in your e-mail*
3. *Is Heathcare staffing now out of the picture?*

As for item 2 of your e-mail, we are in the process of putting toether all of the information for our Collection Counsel. We will keep you apprised of all developments.

Later that day, Alcoff replied:

We will send you the 4 most recent MOUs with Bristol Manor, Harborview, Palisades and Castle Hill. Healthcare Staffing is not relevant.

There is no record evidence of any further communications between Alcoff and Sahm regarding these matters.

3. The Alleged Failure to Remit Contributions

In May 2007, Blount was promoted to the position of Fund collection manager.[28] Prior to that time she served as an assistant manager in the Fund's processing department. As Blount testified, after an employer and a local union execute a collective-bargaining agreement, the contract is submitted to the Fund to ascertain that it conforms to Fund requirements and is then submitted to counsel for final approval. Once such approval is granted, the collection department establishes a computer file with an employer number and site number. If the contract is not approved, it is returned to the parties with a letter indicating the language necessary for compliance with Fund requirements.

Blount testified that after she became collection manager, she was assigned to investigate a group of checks that the Fund did not have contracts for and determine who they belonged to. These were the checks drawn on the accounts of Healthcare and Sunshine. As Blount testified, because Healthcare and Sunshine were not parties to collective-bargaining agreements, files had not been created for them in the Fund computer database and they were not recognized as employer participants.

Thereafter, the Fund trustees determined that, inasmuch as Healthcare and Sunshine were not parties to collective-bargaining agreements authorizing the Fund to accept their contributions, the remittances should be returned. Accordingly, on October 10, 2008, Blount wrote separately to Healthcare and Sunshine as follows:

Please find enclosed checks issued by [Healthcare] [Sunshine] for the period of August

[28] She currently serves as the Fund's benefits processing manager.

2003 through January 2007.

Unfortunately, the SEIU National Industry Pension Fund (NIPF) has been unable to process these payments because we have not reveived a signed copy of the Collective Bargaining Agreement (CBA) between [Healthcare] [Sunshine], and SEIU Local 1199 NJ which requires contributions to the fund. The NIPF has made numerous attempts to Local 1199NJ to obtain a signed copy of the CBA, which have been unsucessful.

In accordance with a recent Board of Trustee decision, to return contributions to employers without an acceptable CBA on file with the Fund within 6 months or more after the receipt of the first contribution payment, we are returning and refunding all checks that have been received from [Healthcare] [Sunshine]. In addition, most of the checks are older than 6 months and would have to be reissued upon receipt of the acceptable CBA.

Please be advsied that we will not accept any future payments from [Healthcare] [Sunshine] until we receive an acceptable signed copy of the CBA. Lastly, please keep in mind that once an acceptable CBA is received late fees and interest wil be assessed on contribution payments older than 30 days.

A copy of this letter was sent to the SEIU Local 1199NJ President Milly Silva.

As Blount testified, after this letter was sent, Silva and Union attorney Ellen Dichner contacted her to discuss why the Fund had decided to return the contributions from Healthcare and Sunshine. A conference call was scheduled on two prior occasions, but did not occur until February 9, 2009.

On February 9, a telephonic conference was held among Blount, Silva, Dichner and other Fund personnel. Blount explained that the Fund did not have signed contracts with Healthcare and Sunshine and that therefore, the pension contributions were returned to these vendors. Silva and Dichner maintained that the local union had sent the Fund copies of the applicable MOAs and urged the Fund to search their files for the relevant documents.

Blount testified that at that point she undertook an investigation and learned that Healthcare and Sunshine had been contributing for CNAs and recreation employees, respectively, for the Omni facilities. She additionally learned that both Healthcare and Sunshine had ceased making contributions to the Fund as of January 2007.[29]

The last check sent by Healthcare, dated May 9, 2007, is for contributions applicable to January of that year. Similarly the last check sent by Sunshine, dated May 8, 2007, is for January 2007 contributions to the Fund. Both checks are attached to rosters of covered employees which reference the various Omni facilities by name. Blount offered no explanation as to why these reports would not have, or did not, assist the Fund in ascertaining which employees the contributions were being made on behalf of.

At some point after the February 2009 conference call, the Fund advised the Union that the Employer had ceased remitting contributions for periods after January 2007. The Union was further told that the Fund had reversed its decision to refund contributions to Healthcare and

[29] Blount offered no explanation of why she did not become aware of this in October 2008, when she returned the remittances to Healthcare and Sunshine.

Sunshine and that both vendors would be set up in the Fund's system pursuant to the 2002 MOA.

On April 9, Fund collection manager Miriam Gibbs wrote to Healthcare and Sunshine advising as follows:

> *A letter was sent to you dated October 10, 2008, notifying you that the SEIU National Industry Pension Fund was unable to process your payments due to non receipt of a signed collective bargaining agreement. . .*
>
> *We have subsequently received signed collective bargaining agreements, enabling the Fund to properly setup your account. The initial date of contribution is September 1, 2002. Contributions are presently due for September 1, 2002 through March 31, 2009. Additionally, remittance reports are due for the following periods: September 2002 through July 2003 and January 2007 through March 2009.*
>
> *Although the National Industry Pension Fund will accept the collective bargaining agreement for the term of July 25, 2002 thorugh July 24, 2007, any new agreements requiring contributions to the National Industry Pension Fund must adhere to the terms of the enclosed Bargaining Basics Manual. For example:*
>
> *1. Pension contributions are required on all bargainining unit employees from date of hire or no later than 90 days of employment and all other employees (such as temporary, casual, on-call, extra, seasonal and no frill) are covered after 1,000 hours of employment.*
>
> *2. The CBA must specify the pension contribution rate as a flat dollar amount or a percentage of pay. The minimum contribution rate is $0.15 per hour for all new contracts and renewals with effective dates after July 1, 2004.*
>
> *3. The CBA must clearly state that the pension contributions are to be remitted to SEIU National Industry Pension Fund.*
>
> *4. All employers must agree to be tound by the NIPF Trust Agreement.*

There was no response to these letters.[30]

[30] At the hearing Respondent sought to introduce into evidence a document which purports to be a summary of checks issued by Harbor View, Healthcare and Sunshine, sent to the Fund during the period from January 2008 through June 2009, showing which checks were deposited and which were not. No testimony was adduced with respect to this document. Moreover, Respondent has failed to present sufficient evidence to allow me to draw any specific finding regarding whether these remittances covered all unit employees or whether they fully satisfied Respondent's obligations to the Fund for the applicable period of time. I further note that Respondent makes no reference to this summary or its purported evidentiary value in its post-hearing brief. Accordingly, I give it no weight as regards the issue of whether Respondent has committed an unfair labor practice. Even if I were to find that the summary represents efforts by Healthcare and Sunshine, on behalf of Respondent, to resume contributions to the Fund for unit employees for the period from January 2008 through June 2009, such a finding would not be determinative of whether the Respondent had committed an unfair labor practice, as alleged in the complaint, but would be a matter of mitigation appropriately addressed in a compliance

Continued

III. Analysis and Conclusions

A. *The Alleged Failure to Provide Information*

The complaint alleges and General Counsel contends that the following information sought by the Union is presumptively relevant or, alternatively, that its relevance has been demonstrated: documents showing overtime hours worked by bargaining unit employees on a quarterly basis in 2006 and 2007, [31] the names of no-frills employees, the names of agencies used by Respondent for temporary staff and copies of invoices showing names, number of hours worked, rates billed and job titles for each agency employee, copies of work schedules, OSHA injury and illness reports for 2005, 2006 and 2007, copies of Medicaid cost reports for 2005 and 2006 and per-employee monthly premium cost for employer-funded single health insurance. The General Counsel further contends that, since October 19, 2007, the Employer has either failed and refused or unlawfully delayed in providing such information to the Union. As discussed in further detail below, Respondent contends that it sufficiently complied with the Union's information requests to allow it to meaningfully bargain and that the Union's repeated requests were interposed in bad faith, for the purpose of delay and to forestall a valid bargaining impasse.

1. Applicable Legal Principles

It is well-settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to assess proposals and claims made by the employer relevant to contract negotiations. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435-436 (1967). *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 153 (1956).

Information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant, and must be provided upon request, without need on the part of the requesting party to establish specific relevance or particular necessity. *Iron Workers Local 207 (Steel Erecting Contractors)*, 319 NLRB 87, 90 (1995). In such an instance, the employer bears the burden of showing a lack of relevance. *AK Steel Co*., 324 NLRB 173, 183 (1997); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). Moreover, a union may rely upon the presumption of relevance of information pertaining to employees within the bargaining unit and has no further obligation to explain its significance, unless and until the employer establishes legitimate affirmative defenses to the production of the information. *Beverly Health and Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005). See also *Quality Building Contractors*, 342 NLRB 429, 430 (2004) quoting *Commonwealth Communications*, 335 NLRB 765, 768 (2001): "When a union seeks information pertaining to employees within a bargaining unit, the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy."

Requests for matters outside the bargaining unit require a demonstration of relevance.

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proceeding.

[31] The complaint additionally alleges a failure or delay in providing documents showing "regular hours of work." The General Counsel does not make specific reference to any such allegation other than the alleged failure to provide employee work schedules, which is discussed below.

Shoppers Food Warehouse Corp., 315 NLRB 258, 259 (1994); *Ohio Power Co*., 216 NLRB 987, 991 (1975), enfd. 531 F. 2d 1381 (6th Cir. 1976). The Board uses a broad, discovery-type standard in determining the relevance of requested information. Thus, the burden is not an exceptionally heavy one, requiring only that the desired information would be of use to the party in carrying out its statutory duties and responsibilities. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *Shoppers Food Warehouse*, supra; *Richmond Health Care*, 332 NLRB 1034, 1035 (2000)(potential or probable relevance is sufficient to give rise to an employer's obligation to provide information). A party has satisfied such a burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. However, the Board has also held that, as to non-unit information for which relevance must be demonstrated, the General Counsel must present evidence either that the union demonstrated the relevance of the non-unit information or that the relevance of the information should have been apparent to the respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). The Union's explanation of relevance "must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." 350 NLRB at 1258 fn. 5 (citations omitted).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Woodland Clinic*, 335 NLRB 735, 736 (2006); *Good Life Beverage Co*., 312 NLRB 1060, 1062 fn. 9 (1993). "An employer must respond to the information request in a timely manner" and "[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all." *Amersig Graphics, Inc*., 334 NLRB 880, 885 (2000); see also *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005) (and cases cited therein).

2. Respondent's Contentions as to the Alleged Failure to Provide Information

With regard to the Union's information requests generally, Respondent argues that the Union propounded such requests on Harbor View for reasons other than to move the bargaining process forward. In particular, Respondent argues that the Union's information requests were made to avoid meaningful bargaining and in a futile attempt to avoid reaching impasse. In support of this argument, Respondent contends that the Union repeatedly demanded information which had already been received, which was readily attainable or wholly unnecessary to the bargaining process or that it was not entitled to obtain. Respondent additionally contends that it responded to the Union's initial information request prior to the first bargaining session and asserts that the Union never objected that this initial production was incomplete. [32]

Respondent further argues that that the Union was able to, and did, make its initial "comprehensive" proposal relying on the information already within its possession, and did not require any further information prior to putting forth subsequent proposals. In this regard, Respondent relies upon testimony, adduced from Union witnesses, that the Union formulated its proposals based upon factors such as input from employees, knowledge of general employment

[32] Here, Respondent misconstrues the record. As has been noted above, on June 4 (prior to the first negotiation session) Saint Hilare wrote to Respondent objecting that its response to the April 25 information request was incomplete and noting that no information whatsoever had been sent with regard to Harbor View. The Union then raised the issue of Respondent's non compliance at the first meeting of the parties, on June 19 2007 and, as Respondent acknowledges and the record reflects, continually thereafter.

standards in the industry and a negotiating strategy based upon their assessment of what could be obtained through negotiations with this particular employer. Respondent argues that such testimony constitutes an admission that the Union did not require the information to negotiate.

Respondent thus argues that it sufficiently complied with the Union's repeated information requests, that it provided information to the Union on numerous occasions and, further, that any limited delay in providing information is not unlawful. In addition, as Respondent contends, the Union's repeated information requests constitute evidence of its bad faith in negotiations.

In support of its contention that any alleged delay in providing the Union with information was not unlawful, Respondent relies upon *Good Life Beverage Co*., 312 NLRB 1060 (1993) and *Union Carbide Corp*., 275 NLRB 197 (1985). In *Good Life Beverage Co*., supra, the Board found that a five and one-half month delay in providing information was not unlawful where the information sought raised confidentiality concerns and the employer sought to discuss the matter to reach an accommodation with the requesting union for mutually agreeable protective conditions. Here, Respondent has pointed to no such circumstances. In *Union Carbide*, which dealt with a delay of over ten months, there was no showing that the requested information, which was voluminous, could have been produced any sooner, that there was any urgency in fulfilling the request or that it involved a matter currently or forthcoming in any negotiations between the parties.

In the instant case, while it appears that the Union requested a significant amount of information from the Employer initially, and subsequently, Respondent has failed to argue or to present any evidence that any alleged delay in providing information was due to the volume of that request, or Respondent's need for time to assemble it or receive documentation relative to such demands.[33] Moreover, the record fails to establish that Respondent raised any such objection to the Union. Nor has Respondent propounded such an argument here. Rather, as set forth above, Respondent consistently took the position either that it had fully complied with the Union's request or that the information sought was unnecessary for the Union to bargain.

Moreover, contrary to Respondent's suggestion, the Board has consistently found an unexplained delay in furnishing relevant information to be unlawful. See e.g. *Woodland Clinic*, supra at 736 (delay of seven weeks unreasonable, absent explanation); *Bundy Corp*., 292 NLRB 671, 672 (1989) (delay of over two months unreasonable, and explanation offered for delay inadequate); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (employer replied within two weeks, providing some information, but did not supply rest of information required until six weeks later and no explanation provided for "foot dragging"); *International Credit Service*, 240 NLRB 715, 718 (1979) (unexplained delay of six weeks unreasonable); Local 12 Engineers, 237 NLRB 1556, 1558-1559(1978) (information supplied six weeks after initial request and after charge filed); *Pennco Inc*., 212 NLRB 677, 678 (1974)(employer unreasonably failed to respond to information requests for over one month and did so only after charge filed).

Respondent contends that the circumstances of the instant case are "strikingly similar" to those presented in *United Engines Inc*., 222 NLRB 50, 55-56 (1976). There, the respondent was

[33] In this regard I note that the Union initially made an information request in April 2007. The October 2007 and February 2008 requests referred to in the complaint, for the most part, reiterate this prior request to the extent it had not been complied with. Thus, it is apparent that Respondent had a significant period of time to assemble the information sought.

charged with a delay in transmitting certain relevant data which the union sought in connection with bargaining negotiations until it was informed that the union had filed unfair labor practices with the Board. The administrative law judge found that the respondent had not violated the Act. In that case, the respondent never raised any objection to disclosure of the information sought by the union, characterized as "copious" and provided the bulk of it within one month of the Union's request. The only outstanding item was the information related to the employer's retirement plan, which the respondent said would be covered in a booklet and provided as soon as it was received. The booklet was then provided. Thereafter, as the judge found, the respondent "invited further requests" by the Union for additional information. Once such requests were made, the information was promptly furnished.

Here, while it is undeniably the case that Respondent did provide information to the Union as had been requested, it is also apparent that some information was delayed and other information not provided at all. As the above-cited cases demonstrate, Respondent is not empowered to make a unilateral determination that presumptively or otherwise demonstrably relevant information sought by the Union is unnecessary or irrelevant to bargaining or the performance of the Union's statutory duties. To the contrary, Respondent's arguments in this regard have been rejected by the Board and the courts. "That the information appears unnecessary to an employer is obviously an inadequate ground for refusal …" *Amphlett Printing Company,* 237 NLRB 955, 956 (1978). Moreover, had the information sought by the union been provided in a timely fashion, it is reasonable to infer that it could have been used to determine strategy and tactics in the negotiations: "Priority of issues, consideration of bargaining strategy as to trade-offs of economic and non-economic issues, even the nature and extent of the bargaining posture on the various issues might well have been impacted upon by such information and the need therefore would be current and present throughout the negotiations." *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1014 (1996). Further, contrary to Respondent's contentions, the fact that a contract has been negotiated without the requested data does not prove that the information is not relevant. See *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260, 266 (2d Cir. 1963); cert denied, 375 U.S. 834. In *NLRB v. Yawman & Erbe Mfg. Co*., 187 F.2d 947, 949 (2d Cir. 1941), the court stated:

> Nor is our determination that the information was relevant affected by the subsequent execution of a contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.

With the foregoing standards in mind, I will now evaluate the various information requests made by the Union and the Respondent's responses thereto.

3. <u>The Information Requests</u>

a. <u>Overtime Hours Worked by Each Employee on a Quarterly Basis</u>

From the outset, even prior to the initiation of bargaining, the Union sought information showing the overtime hours for each employee on a quarterly basis for the years 2006 and 2007. Information regarding employee overtime, and in particular, overtime information worked by individual employees has been found to be presumptively relevant. *U.S. Information Services*, 341 NLRB 988 (2004) (citing *Blue Cross & Blue Shield of New Jersey*, 288 NLRB 434, 436 (1988) (total hours and overtime hours worked "by each unit employee" is presumptively relevant). The record shows that after the October 19, 2007 letter, the Union renewed its request for such information both verbally and in writing on any number of occasions. Moreover, the record shows that Saint Hilare advised Respondent that such information was necessary to

enable the Union to properly evaluate the impact of its proposal to eliminate daily overtime.

On January 29, 2008, Jasinski stated that such information had been provided to the Union, which as the record demonstrates, is not the case. In fact, no overtime information whatsoever was provided to the Union until April 1, 2008, where it was stated that, "It is fair to estimate that overtime hours typically [range] from 100-300 hours per week over the previous year." The Union then advised Respondent that that was not the information which had been requested. Thereafter, on May 28, 2008, Respondent provided "total overtime hours by quarter of 2006 and 2007" but, again, did not provide the information for individual employees. On June 10, the Union reiterated its request for "overtime hours for each employee." On June 17, 2008, Respondent responded with the "the approximate average overtime worked per employee" for each quarter of 2006 and 2007. Over one year later, in August 2009, Respondent finally provided overtime information to the Union in the form, but not for the time frame, in which it had been initially sought in October 2007 and thereafter.[34]

Aside from its presumptive relevance, it is clear from the record that such information took on additional significance in light of the Employer's proposal to eliminate daily overtime. Thus, the Union has shown that this information was relevant and necessary to enable it to determine the impact the Employer's workweek proposal would have on the bargaining unit, both in relation to individual employees and to the unit as a whole.

Accordingly, I find that by failing and refusing to provide the Union with overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and 2007, as alleged in the complaint, Respondent has violated Section 8(a)(1) and (5) of the Act.[35]

b. The Identification of No-Frills Employees

On October 19, 2007, the Union requested, as it had done previously, that the Employer identify all no-frills employees, without limitation. Union renewed its request both verbally and in writing on numerous occasions.[36] According to Jasinski, the Employer responded to this request verbally at various negotiation sessions and in writing when it told the Union that there were no employees in that category. Similarly, it appears from Saint Hilare's and McCalla's testimony regarding various bargaining sessions that the parties discussed the issue on several occasions. The Employer maintained there were no no-frills employees and the Union was skeptical of the veracity of this claim due to the number of employees without health insurance on the employee lists submitted by the Employer. Notwithstanding the foregoing, there is insufficient evidence to show that the Employer had no-frills employees on its payroll prior to June 2008.

However, the employee list sent to the Union in August 2009 shows that Respondent subsequently came to employ 12 such employees. The first of these was hired on June 24, 2008 and the last on March 31, 2009. There is no evidence that Respondent provided

[34] The information was provided for four quarters in 2008 and the first two quarters in 2009.

[35] Saint Hilare's June 10, 2008 letter updates this request for the period from June 1, 2007 to May 31, 2008. On August 24, 2009 overtime information for 2008 and the first two quarters of 2009 were provided.

[36] See, for example, the specific requests set forth Saint Hilare's February 14 and June 10, 2008 letters. In addition, the issue of the identity of no-frills employees is referenced in letters dated July 7 and 23, 2008. Moreover, the record makes clear that Saint Hilare repeatedly raised the issue at the bargaining table.

information regarding these employees' no-frills' status to the Union prior to August 24, 2009. Notwithstanding any claim of impasse asserted by the Employer, it nevertheless had a continuing obligation to provide this information to the Union in a fashion as timely as circumstances would allow. *NLRB v. Acme Industrial*, supra at 435-437; *Watkins Contracting, Inc.*, 335 NLRB 222, 225 (impasse is only a temporary deadlock or hiatus in bargaining during which an employer has a continuing obligation to supply relevant information.)

Respondent has failed to offer and the record fails to establish any reasonable explanation for its delay in providing such information to the Union. Accordingly, I find that Respondent's failure to timely identify its no-frills employees constitutes a failure to provide information in violation of the Act.

c. Work Schedules

The complaint alleges that the Employer failed and refused or, alternatively, delayed in providing employee work schedules to the Union. In his October 19, 2007 letter, and at various other times throughout bargaining, Saint Hilare requested such information for the periods of October through December 2006 and January through March 2007. In letters dated January 29 and February 20, 2008, Respondent did not dispute that such schedules were maintained and stated that they would be provided under separate cover. However, it was not until May 28, 2008, that Respondent provided work schedules for the dietary, housekeeping and nursing departments for the period beginning in late-December 2007 and continuing through approximately April 2008. On June 10, 2008, Saint Hilare responded that the submission was not fully responsive to the Union's request. Saint Hilare also made an additional request for the daily schedules for February 1, 2008 through the present. On June 17, 2008 Jasinski wrote that the Employer had provided the Union with all the schedules in its possession and that it could not provide the information in a form which does not exist. Thereafter, on August 24, 2009, Respondent produced additional schedules for May and June, 2009.

Such information, as it relates to bargaining unit employees, is presumptively relevant. *Wayneview Care Center*, 352 NLRB 1089, 1115 (2008). Moreover, it is relevant to the Union's investigation of employee complaints regarding staffing and agency usage and would be of use to the Union in effectively generating and bargaining over proposals such matters. Respondent has failed to explain the delay in providing work schedules to the Union, or to offer any valid explanation of why it could not fully comply with the Union's initial request for their production.[37] Accordingly, I find that Respondent has unlawfully delayed and refused to provide the Union with work schedules of bargaining unit employees, as alleged in the complaint.

d. OSHA Injury and Illness Records

The Employer maintains OSHA records which document on the job injuries and illnesses. On October 19, 2007, the Union requested copies of such records for 2005, 2006 and 2007. In his January 29, 2008 letter, Jasinski stated that the facility did not maintain such records. The record establishes that this assertion was contrary to the practice at the facility. The Union's request for OSHA logs was renewed in Saint Hilare's letter of February 14, 2008. Thereafter, on April 1, Respondent provided the log for 2007. On April 9, 2008, Saint Hilare reiterated the Union's request for years 2005 and 2006. Those records were provided on May

[37] As Saint Hilare noted in his letter of July 7, 2008, had the Employer complied with the Union's request in a timely fashion, it is likely that additional schedules could have been produced.

28.

As the Board has found, workplace safety is a mandatory subject of bargaining. See *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000). Accordingly, the Board has found that OSHA logs and other health and safety information is presumptively relevant. *Honda of Hayward*, 314 NLRB 443, 451 (1994). Moreover, Saint Hilare and McCalla testified that such records would be of assistance to the Union in formulating its health and safety proposals. Respondent has failed to rebut the presumption that this information is relevant or to offer any valid explanation of why it failed to provide such information to the Union for more than six months after the October 19, 2007 request.[38] Accordingly, I find that Respondent unlawfully delayed the production of OSHA logs for 2005, 2006 and 2007, as alleged in the complaint.

e. Health Insurance Premium Information

On June 22, 2007, the Employer provided the Union with the total cost for health insurance premiums for 2006 and the first quarter of 2007. The Union had also previously been provided with the cost to employees for dependent coverage. What the Union did not know was the cost to the Employer for its employees' single coverage and, therefore, Saint Hilare requested such information during bargaining, and reiterated this request in his letter of October 19.

On January 29, 2008, Respondent wrote that such information had already been provided. By letter dated February 14, Saint Hilare explained that the information had not been provided and could not be computed, as had been suggested, by dividing the cumulative cost furnished by the number of employees because the number of employees fluctuated from month to month. On April 1, 2008, Respondent provided the monthly insurance premium cost sought by the Union.

The Board has held that premiums paid under health insurance plans are wages, and as such, information regarding premiums is presumptively relevant. *The Nestle Company*, 238 NLRB 92, 94 (1978). Further, it is apparent that the cost of employee fringe benefits is of particular relevance during collective bargaining negotiations.

Moreover, in this case, such information related to an issue central to the parties during bargaining; i.e. whether the Employer would (or would not) agree to some measure of dependent coverage for its employees. Clearly, understanding the costs to the Employer of providing health insurance coverage for its employees might well be of some relevance to the Union in formulating a proposal to bridge the gap between the parties' positions. *Baldwin Shop N' Save*, 314 NLRB 114, 124 (1994).[39] Accordingly, I find the delay in providing such information to be unlawful.

f. Medicaid Cost Reports

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[38] Obviously with regard to this, as well as other, requests, the Employer had been put on notice some six months previously that the Union was seeking such information.

[39] In *Baldwin Shop' N Save,* supra at 124, fn. 8, it was noted that in *Sylvania Electric Products v. NLRB*, 358 F.2d 591 (1st Cir. 1966), cert. denied 385 U.S. 852, the court held "that the Board could properly find that a union was entitled to information concerning the cost of welfare benefits, where the union sought 'better to evaluate the desirability of an increase in welfare benefits as against an equivalent increase in take-home pay.'"

On October 19, 2007, the Union requested copies of Medicaid cost reports for 2005 and 2006. These reports are voluminous, and there is evidence that the Union's research department makes use of them to obtain general information about the size, finances and operations of the nursing home.

On January 29, 2008, Respondent replied that the information was readily available from the State, and that the Union had demonstrated that they are already in possession of such information. On February 14, Saint Hilare wrote: "We understand but do not agree with your position that you need not provide Medicaid cost reports and other related data because this information is available from other sources. Kindly furnish the 2007 report as soon as it is available." On April 9 Saint Hilare noted in a letter to Jasinski that the reports had not yet been received. The reports for 2005 and 2006 were provided by Respondent on May 28, 2008.[40]

Respondent has argued that this information is not relevant and that by seeking such information, the Union has demonstrated its bad faith.

Respondent's apparent position, as stated to the Union, that it was under no obligation to provide the requested data because it could have been gotten from public records is not supported by extant Board law. To the contrary, the duty of an employer to provide relevant information in its possession is not excused by the fact that it may be obtained elsewhere. *Kroger Co.*, 226 NLRB 512, 513-514 (1976); *People Care, Inc.*, 327 NLRB 814, 824 (1999); *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994).

I do not agree with Respondent that the Medicaid cost reports do not contain relevant information. Rather, I find that, inasmuch as they contain primarily non-unit information, their relevance must be demonstrated. Here, I find that there is doubt about whether the Union, at any point during negotiations, sufficiently articulated "with some precision" the basis for its request or demonstrated why such documents would be relevant to bargaining or to any of the Union's other statutory duties and responsibilities. *Disneyland Park*, supra at 1258. I note that neither McCalla nor Saint Hilare testified that they ever specifically stated to the Employer why the Union was seeking this information, and there is no such explanation in any of the correspondence in the record.[41]

In *Troy Hills Nursing Home*, 326 NLRB 1465 fn. 2 (1998), the Board denied the General Counsel's motion for summary judgment as to the respondent's failure to provide Medicare and Medicaid cost reports, finding that they appeared to seek financial information, were not presumptively relevant and that the union had not demonstrated the relevance of such information to the employer. Here too, I find that the General Counsel has failed to meet its burden to show that the Union established the relevance of the information or that such relevance would have been apparent to Respondent. *Disneyland Park*, supra.

New Surfside Nursing Home, 330 NLRB 1146 (2000), cited by the General Counsel, reached a contrary result. There, however, the administrative law judge specifically found that the union agent "explained why the cost reports were relevant to negotiations." 330 NLRB at 1148. The Board, in affirming the judge, specifically noted that the Union had demonstrated the relevance of the information sought. Here, there is no such evidence and, therefore, I cannot

[40] It does not appear from the record that Respondent ever produced the 2007 report.

[41] Saint Hilare's October 19, 2007, February 14 and April 9, 2008 communications to Jasinski on this issue fail to state why the Union is seeking this information and are not sufficient to demonstrate its relevance.

reach a similar conclusion.

Inasmuch as I find that the Union failed to demonstrate the relevance of the Medicaid cost reports and, further, that the General Counsel has not sufficiently established that their relevance would have been apparent to the Employer, I do not find that Respondent has violated the Act by delaying their production, or by failing to provide them in their entirety.

g. The Use of Agency Employees

The General Counsel has additionally alleged that Respondent failed and refused or to provide information to the Union regarding its use of agency employees at its facility.

The Union's October 19, 2007 letter sought the names of all agencies used by the Employer to provide temporary staff and invoices showing the names, number of hours worked, rate(s) billed and job title for each employee provided to the Employer during the period from January 1, 2006 through March 31, 2007. The Union reiterated its request for information regarding the use of agency employees on several occasions thereafter, both at the bargaining table and in writing. On July 23, 2008, the Union updated its request to seek information about possible agency use for the period from January 1 through July 22, 2008.[42] Although Saint Hilare had not spoken to any agency employees, he had had received anecdotal evidence, coming from employees, that agency LPNs were being used during the period of time the parties were bargaining. Such hearsay evidence is sufficient to support an information request. *Magnet Coal, Inc.*, 307 NLRB 444 fn. 3 (1992), enfd. mem. 8 F.3d 71 (D.C. Cir. 1993). Further, the record establishes that Saint Hilare brought these anecdotal reports to the attention of the Employer at various points throughout bargaining.

The information requested is clearly relevant to the Union's concerns, as bargaining representative, of the nature and extent of the use of workers outside the unit who are being used to supplant the unit work force. *Lenox Hill Hospital*, 327 NLRB 1065, 1098-1069 (1999); *United Graphics*, 281 NLRB 463, 465 (1986). Information concerning the identity of such workers, their classifications, wages and the length of time employed at the facility are relevant to determine what Respondent was willing to pay for temporary employees to perform the same work as that performed by unit employees. See *Globe Stores*, 227 NLRB 1251, 1253-1254 (1977) (names, rates of pay, and store of employment of group managers performing the same tasks as rank-and-file employees). Similarly information regarding the names of the agencies used by Respondent is relevant as it provides an independent basis for the Union to conduct an investigation regarding the extent to which unit work is being displaced. Moreover, the relevancy of such information would have been apparent to the Respondent, and I note that Respondent has never contended otherwise.

The record establishes that Respondent repeatedly told the Union that no agency employees were being used at Harbor View. General Counsel does not contest this assertion but argues that the evidence establishes that such denials were false. The evidence relied upon by the General Counsel in support of this contention consists of (1) the anecdotal reports received by Saint Hilare from employees; (2) the memorandum distributed to employees in February 2008 indicating that the facility had retained temporary workers in anticipation of the Union's March 7 informational picketing and (3) Jasinski's purported admission that the facility used temporary workers during the three-day strike in August 2009. In disagreement with the General Counsel, I find that none of the above cited evidence is sufficient to establish that the

[42] The failure to respond to this updated request is not alleged in the complaint.

Respondent had employed temporary workers to perform the work of bargaining unit employees during the period specified by the Union in its information request and alleged in the complaint, or at any other relevant time.

As an initial matter, the second-and third-hand hearsay reports received by Saint Hilare, standing alone, are too insubstantial to form any sort of basis upon which I might conclude that the facility used agency employees during the period encompassed by the Union's information request or during the time they were bargaining in 2007-2008. Further, while Respondent's memorandum to employees indicates that temporary workers would be utilized in the event employees walked off the job as a consequence of the March 2008 informational picket, there is no evidence that there was any such work stoppage. Thus, this evidence is not probative of whether agency employees were, in fact, used at this time. Further, although Jasinski testified that he heard about an agency called Tri-State Health Care during the three-day strike which occurred in August 2009, there is no direct evidence in this record that such employees were actually contracted on that occasion or that, if they were, they performed bargaining unit work.[43]

Thus, it is not contested that while the parties were bargaining in 2007-2008 Respondent told the Union that no agency employees were being used, and there is insufficient probative evidence to establish to the contrary. Accordingly, I cannot conclude that that the Respondent provided false information to the Union or otherwise unlawfully failed and refused to provide information to the Union regarding agency usage, as alleged in the complaint.[44]

Accordingly, for the reasons set forth above, I find that Respondent has failed and refused or unlawfully delayed in providing information, as alleged in the complaint, as follows: documents showing the number of overtime hours worked by each bargaining unit employee on a quarterly basis in 2006 and 2007; the names of no-frills employees; copies of employee work schedules; OSHA injury and illness reports for 2005, 2006 and 2007 and the per-employee monthly premium cost for employer-funded single health insurance. In this manner, Respondent has violated Section 8(a)(1) and (5) of the Act.[45]

B. *The Alleged Unilateral Changes*

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[43] In addition, even if the facility had used such employees, this particular event is sufficiently remote from what has been alleged in the complaint so as to raise serious doubt as to whether it could support a finding that a violation had occurred.

[44] I note that while the General Counsel has maintained that the Medicaid cost reports and work schedules contain information regarding agency usage, no attempt was made to utilize any of these documents, which had been provided to the Union by the Respondent prior to the hearing and entered into evidence in this matter, to question witnesses on this issue or to otherwise adduce probative independent evidence of agency usage.

[45] In his post-hearing brief, Counsel for the General Counsel asserts, for the first time, that Respondent unlawfully delayed in furnishing the Union with copies of the KL Agreement and other memoranda of agreement which had been entered into by the parties. As the General Counsel has noted in his brief, a request for these documents was included in Saint Hilare's October 19, 2007 letter. However, a failure to provide such documents was not alleged in the complaint; nor was this or any related allegation identified by the General Counsel as violation of the Act at any time during the hearing. Accordingly, I find that the matter was not fully litigated and decline to address it further. See *New Surfside Nursing Home*, supra at 1146, fn. 1. In any event, the remedy for such an allegation would be duplicative of what has already been recommended.

The complaint alleges that in July 2008, Respondent implemented its final offer and unilaterally changed terms and conditions of employment for the Bristol Manor unit employees without the agreement of the Union and in the absence of a valid bargaining impasse. Respondent's answer denied these allegations of the complaint and asserts that it legally implemented its last best offer and that Respondent did not change any term and condition of employment for unit employees prior to reaching a valid impasse with the union.

1. Respondent's Claim of Impasse

a. Applicable Legal Standards

The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Cotter & Co*., 331 NLRB 787, 787 (2000), quoting *AFTRA v. NLRB*, 395 F. 2d 622, 628 (D.C. Cir. 1968); see also *Larsdale Inc*., 310 NLRB 1317, 1318 (1993), citing *PRC Recording Co*., 280 NLRB 615, 635, enfd. 836 F.2d 289 (7th Cir. 1987).

The Board does not lightly infer the existence of an impasse, and the burden of proving it rests on the party asserting it. *Naperville Ready Mix, Inc.*, 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir 2001); *Serramonte Oldsmobile*, 318 NLRB 80, 97(1995), enfd. in rel. part 86 F.3d 227 (D.C. Cir. 1996). The existence of impasse is a factual determination that depends on a variety of factors, including the contemporaneous understanding of the parties as to the state of negotiations, the good faith of the parties, the importance of the disputed issues, the parties' bargaining history, and the length of their negotiations. *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967), enfd. sub nom *AFTRA v. NLRB*, supra. The Board also considers the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. *Cotter & Co*., supra at 789; *Wycoff Steel*, 303 NLRB 517, 523 (1991). The Board further takes into account whether the parties continued to meet and negotiate. See e.g. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). In short, the Board requires that both parties believe that they are "at the end of their rope." *Grinnell Fire Protection Systems Co*., 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. den. 534 U.S. 818 (2001)(and cases cited therein).

The Board has recognized that a bargaining stance where both sides merely maintain hard positions and each indicates to the other that it is standing pat is the rule in bargaining and not the exception. *PRC Recording Co*., supra (citations omitted). Where movement between the parties indeed occurs, the Board does not confine its examination of bargaining history solely to the item claimed to be at impasse. See *Sacramento Union*, 291 NLRB 552 (1988), enfd. 888 F.2d 1394 (9th Cir. 1981). Rather, the very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on stalled ones: "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Patrick & Co*., 248 NLRB 390 (1980), enfd. 644 F.2d 889 (9th Cir. 1981); *Sacramento Union*, 291 NLRB at 556 (citation and footnote omitted). Further, although a good-faith impasse temporarily suspends the duty to bargain, the parties are not permanently relieved of their bargaining obligation: "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations which, in almost all cases is eventually broken, either through a change of mind or the application of economic force." *Charles D. Bonnano Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982)(internal quotation omitted).

In addition, "[a]n impasse does not destroy the collective-bargaining relationship. Instead, a genuine impasse merely suspends the duty to bargain over the subject matter of the

impasse until changes in circumstances indicate that an agreement may be possible. Anything that creates a new possibility of fruitful discussion breaks an impasse and revives an employer's obligation to bargain over the subject of the impasse." *Pavilions at Forrestal*, 353 NLRB No. 60, slip op. at 1 (2008)(quoting *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1966)).

b. The Effect of Respondent's Unfair Labor Practices on the Issue of Impasse

The fact that Respondent had, during the period of time the parties were negotiating, committed other independent unfair labor practices strongly weighs against a finding that a valid impasse in bargaining had occurred.

As has long been recognized, a failure to provide information relevant to core issues separating the parties frustrates the bargaining process and precludes a finding of impasse. *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006). Similarly, information that is not produced in a timely manner may also prevent parties from reaching a lawful impasse. *Orthodox Jewish Home for the Aged*, 314 NLRB at 1008. As the Board has found: "A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations." *Decker Coal Co.*, 301 NLRB 729, 740 (1991).

Here, the Employer's refusal to or delay in providing information related to mandatory subjects of bargaining such as overtime, health insurance, employee schedules and the health and safety of employees and went to core issues which were the subject of discussion and debate over the months of negotiations, as discussed above.

As has been noted, Respondent asserts that the Union did not need such information to make its proposals and that the information sought was neither necessary nor relevant. Respondent argues, therefore, that any alleged failure to provide such information is not determinative of whether the parties reached a valid impasse. In support of this contention, Respondent cites *Sierra Bullets LLC*, 340 NLRB 242, 244 (2003). In that case, however, the Board considered the "precise issue" of "whether the mere existence of any information request, regardless of its relevance to the core uses that separate the parties at the bargaining table" precludes a finding of impasse. In that case, the Board concluded that the pendency of an information request relating to an overtime proposal did not preclude a finding of impasse where the information request was not made until the 17th bargaining session, the proposal had not been made until the 16th session, the parties had been previously concentrating primarily on other core issues in bargaining and there was no convincing argument that the information would have broken a deadlock over these other core issues.

In reaching this conclusion, however, the Board made clear the standard relied upon was the relevance of the information to the issues separating the parties. There was no suggestion that anything beyond that standard was required. Thus, Respondent is incorrect in its apparent assumption that it must be shown that the information would have changed the course of bargaining. As has been observed by one court: "the Board has never required the establishment of 'but for' causation in absolute terms." *E.I. du Pont de Nemours, v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007) See also *Caldwell Mfg*. 346 NLRB at 1170 ("To the extent that there is uncertainty about what, if any, new proposals the Union would have made if it had been given the opportunity to review information . . . that uncertainty must be resolved against the Respondent, whose unlawful action created the uncertainty."); see also *Bryant & Stratton Business Institute*, 321 NLRB at 1014. Here, in contrast to the circumstances in *Sierra Bullets*, supra, as both Saint Hilare and McCalla testified, the Union sought information throughout the

bargaining process which was directly tied to proposals or anticipated counterproposals regarding such matters as the proposed elimination of daily overtime, a proposed increase in the allowable number of no-frills employees, staffing levels, medical insurance and the health and safety of employees in the workplace. Much of this information, such as OSHA logs and monthly insurance health insurance premiums was not provided to the Union until after the implementation of the final offer. Other information, such as employee overtime and schedules was not provided until August 2009.

Respondent further relies upon *ACF Industries*, 347 NLRB 1040 (2006). There, the Board found that the union's information request was purely tactical and submitted solely for delay and to avoid impasse where the union requested the information after months of extensive bargaining, after the contract's expiration, after the union's rejection of the employer's final offer, and after the respondent declared it had nothing left to offer.[46] By contrast, here, the initial information request was made prior to the expiration of the 2002 MOA and before bargaining commenced. Moreover, here the Union reiterated its requests throughout bargaining, well prior to Respondent's declaration of impasse and final offer.

Accordingly, I find that Respondent's failure to provide presumptively or otherwise relevant information regarding bargaining proposals and mandatory subjects of bargaining is a factor which weighs strongly against a finding that there was a valid bargaining impasse.

C. *Consideration of Impasse Factors*

1. The Parties' Bargaining History

While the Union or its predecessor Local 1115 have represented employees at Harbor View for a number of years and have executed a series of MOAs, this was the first negotiation that was conducted by these particular principals and the record reflects that there were initial obstacles including the lack of a fully integrated recent collective-bargaining agreement for the parties to work from.

In support of its contention that impasse had been reached, Respondent notes that the negotiations spanned a period of over one year. *Richmond Electrical Services*, 348 NLRB 1001 (2006); *Lou Stechers Super Markets,* 275 NLRB 475 (1985). *J.D. Lunsford Plumbing*, 254 NLRB 1360 (1981). Respondent thus argues that it properly declared impasse under such circumstances. Of course, inasmuch the parties commenced bargaining in June 2007, and Respondent declared impasse in March 2008, it can hardly be said that they had been bargaining for a year or more. In addition, such a claim fails to acknowledge the relatively few sessions held during this period of time.

The General Counsel argues that there were many issues to be resolved that complicated the negotiations including the fact that Respondent had furnished the Union with a compilation agreement which did not accurately represent existing terms and conditions of employment and Respondent's continual non-compliance with the Union's information requests.

Here, the parties' bargaining history does not support a finding of impasse. Respondent continued to provide information to the Union in a piecemeal basis during the entire year of

[46] The Board additionally found that the parties had reached a good-faith impasse, and the union showed no interest post-implementation bargaining.

bargaining, up to and, in significant part, after its declaration of impasse. As noted above, much of this information concerned itself with mandatory subjects of bargaining that were in dispute.

The history of the contract negotiations, as described by the parties, similarly fails to demonstrate that the parties had reached impasse. The evidence does not support the Respondent's contention that the Union's proposals were cosmetic, meant to create the illusion, but not the reality of bargaining. For example, on cross-examination Respondent adduced testimony from Saint Hilare that, at the February 12, 2008 meeting the economic proposals exchanged by the parties represented concessions from their prior positions and that the parties were engaging in "meaningful discussions" at the time. At the following session, on February 25, the Union modified its proposal even further, extending the contract term and reducing the amount of the signing bonus. Although these proposals may not have represented concessions sufficient to satisfy the Employer, they were concessions nonetheless.[47] The Employer presented its counter-proposal at the next session, which also contained certain concessions, and the evidence is unrebutted that the Union stated at the time that the Union was preparing a counter-proposal on both language and economics. Although Jasinski testified that he declared that the parties were at impasse at that time, the history of the bargaining, as set forth in the record, fails to show that that was actually the case. Respondent has failed to meet its burden to show how, in two bargaining sessions, the parties went from "meaningful discussions" to the sort of deadlock which would establish impasse.

Respondent has argued that the Union never modified its non-economic proposals after October 2007. The record shows that the Union made an initial proposal encompassing the so-called non-economic or language proposals at the first bargaining session. The Employer then submitted its language proposals. After that time, as a result of discussions at the Harbor View and Castle Hill tables, the Union had modified its initial proposal to approach the Employer's proposals. There is no evidence that Employer ever responded in a substantive fashion to this counter-proposal. Rather, at the February 12, 2008 meeting, the Employer referenced its initial proposal and stated that unless the Union was prepared to provide a counter-offer, its previous proposal was final. Thus, the Employer had put the Union in the position of bargaining against itself with regard to such matters. Moreover, as the record reflects, the two bargaining sessions that were held between October 2007 and March 2008 primarily concerned themselves with the exchange of economic proposals. At the end of the March session, the Union stated that it had further proposals to put forward. Thus, it cannot be said that the record establishes that the Union demonstrated an unwillingness to move further with regard to non-economic matters.

The evidence of the parties' final meeting, in September, 2009, does nothing to alter my conclusions. This meeting, which appears to have been prompted by a strike by Respondent's employees, revived the moribund bargaining relationship, and demonstrates that the parties have more to discuss, in particular a regards the issue of dependent health coverage, and that further meetings can prove fruitful.

Thus, I conclude that the parties' bargaining history does not support Respondent's contention that they had reached a valid impasse at any time prior to the implementation of the final offer.

2. Good Faith of the Parties in Negotiations

[47] Thus evidence fails to support Respondent's contention, as set forth in its brief, that the Employer was the only side which made movement, especially with regards to wages.

Respondent accuses the Union of adopting a "take it or leave it" strategy, maintaining fixed positions and engaging in regressive bargaining throughout negotiations. Respondent accuses the Union of an effort to stall negotiations by insisting on reaching an agreement with the same terms as the Tuchman Agreement (also referred to by Respondent as the "master agreement" or the "statewide agreement"). In support of this contention, Respondent relies upon *Richmond Electrical Services*, supra; *J.D. Lunsford Plumbing*, supra and *Matanuska Electric Assn.*, 337 NLRB 680 (2002). In addition, as noted above, Respondent has contended that the Union's information requests were purely tactical and made for the purpose of delay and to foreclose a finding of impasse. *ACF Industries*, 347 NLRB at 1043.

Based upon the credited evidence herein, I cannot conclude that the Union bargained in bad faith. I do not agree that the Union adopted a "take it or leave it" strategy or maintained a fixed insistence on obtaining either industry standards or terms in lockstep with those found in the Tuchman Agreement.

Initially, I note that it has been recognized that a union has the legitimate right to seek for its members the same or similar terms and conditions of employment that have been negotiated with other employers. *Teamsters Local 282 (E.G. Clemente Contracting)*, 335 NLRB 1253, 1255 (2001); *Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965). In determining bad faith, the Board considers the totality of a party's conduct. *St. George Warehouse*, 341 NLRB 904, 908 (2004). Here, under all the circumstances, Saint Hilare's statement that the Union was seeking a "state-wide contract" is encompassed by the foregoing precedent.

While Saint Hilare articulated the Union's goals, there is no evidence that the Union negotiators stated that any issue was nonnegotiable or that had to be in lockstep with the terms of any other agreement. To the contrary, the record establishes that the Union made various concessions on non-economic issues which reflected an attempt to reconcile the parties' varying positions on matters such as the probationary period, union activities and communications, discipline and discharge, transfers and promotions, seniority, layoff and recall and health and safety. Concessions were offered during bargaining regarding economic issues, as well, in particular regarding the term and effective date of the agreement, wages and the date minimum salaries would take effect. Moreover, at the bargaining session on February 25, 2008, the Union presented the Employer with a significant modification of its proposal for family health coverage whereby the Employer would not pay any premiums for the first five years and then be subject to a sliding scale and would be liable for the full premium only after an employee had reached ten years of employment. In this regard, there is no probative evidence that the Union insisted on the Employer's participation in the GNYBF. They sought from the outset an improvement in benefit levels, but their written proposals made plain that the Employer retained the option to provide those benefits through another plan.

Matanuska Electric Assn., supra, cited by Respondent, is inapposite here. In that case the Board found that the union had engaged in stall tactics including taking the position that "all words are ambiguous" and insisting that the employer was obliged to explain its motivation. In addition, the employer stated that it was willing to continue bargaining if the union submitted a proposal showing movement, but the union failed to do so. 337 NLRB at 683-684. Those facts are clearly distinguishable from those presented by the circumstances of this case.[48] Similarly in *Teamsters Local 418,* 254 NLRB 953, 957 (1981), also relied upon by Respondent, the Board found that the union had violated the Act when it refused to meet or submit proposals to the

[48] *Richmond Electrical Services* and *J.D. Lunsford Plumbing*, also cited by Respondent, are discussed below.

employer until national negotiations were completed because, as the union's agents admitted, it was under a mandate not to sign a contract which differed from those of a master agreement. There, the union's bargaining was found to be a "sham." Here, despite Respondent's claims to the contrary, there is no such evidence or suggestion of such an intention in the Union's conduct during negotiations.[49]

Based upon the foregoing, I find that the evidence fails to support Respondent's assertion of bad faith on the part of the Union.

Respondent argues that the record demonstrates that it continually bargained in good faith. In support of these contentions, Respondent points to the fact that it agreed to the Union's proposed location for the bargaining sessions; extended the collective-bargaining agreement on two occasions; agreed to the appointment of a federal mediator; sought the Union's approval prior to implementing a holiday bonus and supplied information both prior to the initiation of bargaining and on numerous occasions thereafter.

Assuming that Respondent had engaged in a period of good-faith bargaining, such a finding would not necessarily establish that it was privileged to implement its final offer. "An employer that engages in a period of good-faith efforts to reach a contract still violates the Act if it unilaterally implements new terms of employment before exhausting the prospects of concluding an agreement." *Newcor Bay City Division*, 345 NLRB 1229, 1240 (2005). Further, in this case, such claims become far less supportable where there is a clear failure to timely provide presumptively or otherwise relevant information.

3. Contemporaneous Understanding of the Parties as to the State of Negotiations

Here, the overall course and conduct of the parties does not evince a mutual understanding that further bargaining would not take place or be fruitful. As an initial matter, I credit the testimony that Saint Hilare advised Respondent, at their final meeting on March 5, 2008, that the Union had further moves to make and would prepare a counter-proposal to the Employer's final offer. Saint Hilare reiterated this position on March 28 and requested that the Employer return to the bargaining table. Jasinski's correspondence to Saint Hilare similarly appears to acknowledge that further negotiations could prove fruitful. For example, on April 22, he wrote that the Employer was "fully prepared to continue negotiating in good faith." Similarly, on June 17, 2008, he wrote to Saint Hilare: "We recognize that you are currently away on vacation . . . We suggest you propose dates in July and August. . ." Jasinski sent a letter on June 23 complaining that Saint Hilare had not contacted either the Employer or the mediator suggesting that Saint Hilare contract the mediator to propose dates.[50] He also continued to send information to the Union. After reviewing these letters, Saint Hilare wrote to Jasinski and

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[49] Respondent and the Union each allege that their respective positions regarding the applicability of the KL Agreement demonstrate bad faith. The KL Agreement expired in 1996 and has been superseded by any number of subsequent agreements. While I accept the argument advanced by the parties – that the absence of a current full agreement presented an obstacle to negotiations- I also note that there is no evidence the parties were in disagreement about the terms and conditions of employment which were then applicable to Harbor View employees. Clearly, the issue provided yet another source of continued friction between the parties; however I do not find that the parties' maintenance of their respective positions regarding the applicability of the KL Agreement constitutes evidence of bad faith bargaining.

[50] As noted above, Jasinski was aware that Saint Hilare was unavailable for much of the month of June.

reiterated the Union's desire to continue to meet and bargain.

The Union's course of conduct, on whole, demonstrates that it was willing to continue negotiations with Respondent. While both parties may have been frustrated with each other's bargaining positions and the pace of negotiations, such frustration is not the equivalent of a valid impasse, nor does it mean that a negotiated settlement is not within reach. *Grinnell Fire Systems*, supra at 585, citing *Powell Electrical Mfg. Co*., 287 NLRB 969, 974-974 (1987), enfd. as modified 906 F.2d 1007 (5th Cir. 1990)(futility, not some lesser level of frustration, discouragement or apparent gamesmanship is necessary to show impasse.)

With regard to Respondent's announcement of its final offer, I note that the Board has held that the assertion of a "final" position does not, by itself, require a finding of impasse. *Grinnell Fire Protection Systems*, 328 NLRB at 585 (citing inter alia, *PRC Recording Co*., 280 NLRB at 640). See also *Cotter & Co*., 331 NLRB at 791, where Member Brame quoted Judge Posner for the proposition that one party's proffering of a so-called final offer is not conclusive on the question of impasse because, "[a]fter final offers come more offers."[51]

Based upon the foregoing, I conclude that the evidence is insufficient to meet Respondent's burden of proof that, at the time of the promulgation or implementation of the final offer the parties were of a contemporaneous mutual understanding that further bargaining would be futile. I further find that the objective evidence does not support Respondent's unilateral reliance on such an assumption.

4. Importance of the Issues Central to the Bargaining

As Respondent notes, there were various key issues that remained in dispute up to and through the final bargaining session. These include health insurance, wages, and minimums. Respondent argues that the Union remained fixed in its position on such issues and the resulting disputes created an impasse. *Richmond Electrical Services*, supra; *J.D.Lunsford Plumbing*, supra, In this regard, Respondent argues that the parties need not reach impasse on all issues before an employer may lawfully implement its bargaining proposal. *Calmat Co*., 331 NLRB 1084, 1097 (2000).

In disagreement with Respondent, and notwithstanding the fact that the parties had not reached agreement on several critical issues, I cannot conclude that the evidence establishes that the parties were at impasse at the time of the implementation of the final offer. The Union never told the Employer that it would be unwilling to make further concessions on any particular issue. Whether the parties could have eventually resolved their differences is unknown; however, the evidence is clear that the Union was willing to continue bargaining and, even after the final offer had been implemented, the Employer advised the Union that it was willing to doing so as well. Under these circumstances, Respondent was required to "recognize that negotiating sessions might produce other or more extended concessions." *Royal Motor Sales*, 329 NLRB 760, 772 (1999), enfd. sub nom *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir 2001).

Richmond Electrical Services, supra and *J.D. Lunsford Plumbing*, supra, cited by Respondent, may be distinguished in that the unions in those cases refused to accept any terms different from the standard, area contracts. In *Richmond,* the union conceded that the most-

[51] *Chicago Typographical Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

favored-nations clause precluded it from agreeing with the employer on wages lower than those in the industry-wide agreement, and the Union never proposed lower wages. In addition, the impasse over wages there led to "a complete breakdown in negotiations." 348 NLRB at 1003. Similarly, in *J.D. Lunsford Plumbing*, supra at 1366, it was found that the union therein, "was simply unprepared to take anything less than it had obtained from the Association's members." Here, by contrast, there is no evidence that the Union insisted on the Tuchman Agreement or any other collective-bargaining agreement to the extent that it was unwilling to compromise further. For example, the minimum salaries proposed by the Union were less than those that were currently in effect under the Tuchman Agreement. In addition, it had proposed a significant concession in regards to dependent health coverage, a benefit that was available to employees at other facilities after six months of employment.

Similarly, *Calmat Co*., supra, is distinguishable insofar as it holds that impasse on a single critical issue may place such a hold on negotiations to render further bargaining meaningless. There, however, the union specifically told the employer that it would not make any further proposals unless and until the respondent "got off its . . . damn pension proposal." When the respondent's negotiator said that was not possible the union's negotiator acknowledged that the parties were "hung up on that" and the employer's representative concurred. 331 NLRB at 1099. Further, at one point prior to the communication of the respondent's final offer, the union told the employer that unless it took its pension proposal off the table there would be no movement on any other issue. In a letter communicating the final offer, the employer noted that the parties were at "irreconcilable odds." Such circumstances do not obtain here, where there is insufficient evidence to meet Respondent's burden to show that the parties had reached the sort of stalemate resulting in intractable positions on any issue or group of issues which would render further bargaining futile.

By contrast, the Board has found no impasse to exist even when the evidence shows a "wide gap" in the parties' positions. See e.g. *Grinnell Fire Systems*, supra at 585-586 (no impasse where employer expressed unwillingness to move from its positions and the union had not offered specific concessions, but the union had declared its intention to be flexible and sought further bargaining); *Newcor Bay City Division*, 345 NLRB at 1239, (union's agent asked to continue bargaining, assured the employer that it was prepared to negotiate and it was expected that the union would make concessions based upon information provided by the employer); *Hayward Dodge*, 292 NLRB 434, 468 (1989)(notwithstanding a "wide gap" there was reason to believe that further bargaining might produce additional movement). Similarly, here, the evidence here shows that despite a "wide gap" on wages, minimums, health insurance and other issues, the Union officials were not at the end of their rope, but were willing to negotiate further.

D. <u>*The Alleged Unilateral Changes in Terms and Conditions of Employment*</u>

The general outline of the relevant law is well-settled. During negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While such negotiations are ongoing, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991)(footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Moreover, no impasse is possible where an employer presents the union with a "fait accompli" as to a matter over which bargaining to impasse is required. *Dorsey Trailers, Inc*., 327 NLRB 835, 858 (1999) (citations omitted), enfd. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000).

As discussed above, I have found that the parties had not reached impasse in bargaining. Moreover, the record establishes that Respondent has made unilateral changes in terms and conditions of employment. In particular, on or about April 1, 2008, Respondent implemented its final offer which, among other things, eliminated daily overtime pay, reduced health insurance benefits for employees working between 20 and 30 hours per week and partially implemented its proposal regarding a uniform allowance for certain employees. In addition, Jasinski testified that other provisions of the final offer have been implemented.

All of the foregoing changes implicate wages, hours and other terms and conditions of employment and are, therefore, mandatory subjects of bargaining. See e.g. *Verizon New York, Inc*., 339 NLRB 30, 31 (2003) (wages); *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 159 (1971)(pension and insurance benefits for active employees); *Mid Continent Concrete*, 336 NLRB 258, 259(2001)(health insurance benefits); *Keeler Die Cast*, 327 NLRB 585, 588-589 (1999)(wages, overtime, insurance coverage and vacation policies).

Accordingly, by making such changes in the absence of a valid impasse in bargaining and without the consent of the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

E. *The Alleged Unilateral Discontinuance of Pension Fund Contributions*

1. Contentions of the Parties

The complaint, as amended at the hearing, alleges that since on or about February 1, 2007, the Employer unilaterally refused and failed to make pension fund contributions without notifying or bargaining with the Union. This allegation is based upon an amended charge, filed on April 9, 2009, which amended an earlier charge filed in December 2007. At the hearing, Respondent answered the amended complaint, denying the material allegations and asserting certain affirmative defenses. In particular, Respondent argued that the allegations of the amended complaint were not supported by the evidence, were time-barred by Section 10(b) of the Act and did not relate back to the original charge as the amendment was predicated upon a different legal theory from that set forth in the initial charge. In its post-hearing brief, Respondent further argues that the Union is without standing to raise the claim. [52]

[52] In its post-hearing brief, Respondent additionally asserts, without citing any legal authority, that "any claim of a violation would be covered by the grievance procedure under the terms of the applicable collective bargaining agreement." To the extent that this claim is intended to be construed as an argument for deferral, such a claim is misplaced. Deferral is an affirmative defense that can be waived if not raised in a timely fashion. To be timely raised, such a defense must be raised either in the answer or at the hearing. *15th Avenue Iron Works*, 310 NLRB 878, 879 fn. 12 (1991) enfd. 964 F.2d 1336 (2d Cir. 1992). . Here, Respondent's answer does not raise deferral as a defense. It is true, that at the hearing, Respondent's counsel asserted that, "the proper forum to bring [the alleged failure to make Fund contributions] up would be under the provisions of the trust document that is part of the pension plan. And there are – my understanding is that there is a formal procedure with regards to that." As an initial matter, I am not convinced that such a statement is sufficient to raise the issue of deferral. Further, Respondent provided no evidence about the procedure under the trust documents to substantiate its claim of an alternate forum to resolve this dispute. Moreover, even if I were to find that Respondent had timely raised the issue and established the existence of an arbitral forum, deferral would not be appropriate here. Even though Respondent's failure to make Fund

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The General Counsel argues that the amendment is not time-barred because the allegations of the amended charge are "closely related" to the allegations of the earlier charge in Case No. 22-CA-28153 as they relate to mandatory subjects that were the subject of ongoing contract negotiations. General Counsel further contends that the Section 10(b) period did not start to run until February 9, 2009, when the Fund conducted an investigation into whether Healthcare and Sunshine had contracts with the Union. General Counsel maintains that the Union did not have either actual or constructive notice of the delinquencies prior to that time and that the Respondent has not met its burden of showing otherwise.

As noted above, Respondent argues that only the Fund, and not the Union, has standing to raise the allegations of the amended charge. In support of this contention, Respondent maintains that the Fund and the Union are separate and distinct entities and, moreover, that the Union does not represent the Fund. Respondent further argues that the evidence shows that since 2002 Bristol Manor has always made the required contribution to the Fund and it was the Fund that refused to process the checks it received from August 2003 through January 2007. The Fund then returned the checks and refunded amounts already paid and told the Employer that they would not accept further contributions without a signed collective-bargaining agreement. Subsequently, by letter dated April 1, 2009, the Fund reversed course and found that the Employer would be required to make contributions because it claimed it had subsequently received a signed collective-bargaining agreement. As Respondent argues: "As such, the Union's allegations that the Employer ***deliberately*** failed to make the necessary contributions to the Fund are utterly absurd. . ." (emphasis in original).

2. Analysis

a. The Union has Standing to File the Charge

With regards to Respondent's argument regarding the Union's asserted lack of standing, as an initial matter, I note that the Board administers public policy and its processes may be invoked by any person who believes such policies have been violated. This is reflected in Rule 102.9 of the Board's Rules and Regulations and Statements of Procedure which provides, inter alia, as follows:

> Who may file . . . a charge that any person has engaged in and/or is engaging in any unfair labor practice affecting commerce may be filed by any person . . .

Moreover, in *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9, 17-18 (1943), the Supreme Court addressed the issue as follows:

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payments began during the term of the 2002 MOA, it continued past the expiration date of that agreement and in fact most of the alleged failures to remit Fund contributions occurred post-expiration. As the Board has held, such delinquencies are not susceptible to prospective arbitration. *Indiana & Michigan Electric Co.,* 284 NLRB 53 (1987); *15th Avenue Iron Works*, supra at 879. Accordingly, as the Board would be required to resolve the issue of post-expiration delinquencies, it would be improper to defer the pre-expiration delinquencies, as the Board will not defer only a portion of intertwined issues in unfair labor practice proceedings. Id. Further, here there are other outstanding issues, such as Respondent's failure to provide necessary and relevant information, which are not deferrable under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and its progeny. Such piecemeal deferral is disfavored by Board policy. *15th Avenue Iron Works*, supra.

> The Act requires a charge before the Board may issue a complaint, but omits any requirement that the charge be filed by a labor organization or an employee. In the legislative hearings senator Wagner, sponsor of the bill, strongly objected to a limitation on the classes of persons who could lodge complaints with the Board. He said it often was not prudent for the workman himself to make a complaint against his employer, and that strangers to the labor contract were therefore permitted to make the charge. The charge is not a proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.

The Board has since adopted this ruling in *Bagley Products*, 208 NLRB 20, 21 (1973) and has also specifically affirmed that any person can file an unfair labor practice charge. See *Utility Workers Union of America (Ohio Power Co.)*, 203 NLRB 230 (1973).

b. The Section 10(b) Issue

Section 10(b) of the Act provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

I do not agree with the General Counsel's contention that the amendment is timely because it is "closely related" to the original timely-filed charge. The applicable principles are set forth in *Redd-I, Inc*., 290 NLRB 1115 (1988):

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

Nevertheless, for the following reasons, I find that the amendment to the charge is timely filed. The Section 10(b) limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *See Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005); *see also Allied Production Workers Local 12*, 337 NLRB 16, 18 (2001) (finding that the 6-month period provided by Section 10(b) begins to run only when a party has "clear and unequivocal notice" of the unfair labor practice). "A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *Ohio & Vicinity Reg'l Council of Carpenters*, 344 NLRB 366, 368 (2005) (citing *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001)) (applying Section 10(b) where a charging party was found to have been "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred."); see also

St. Barnabas Medical Center, 343 N.L.R.B. 1125, 1127 (2004) (finding that knowledge is imputed when a party first has "knowledge of the facts necessary to support a ripe unfair labor practice."). If a party "'ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[,]' and 'whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry might have led.'" *See Miramar Hotel Corp*., 336 NLRB 1203, 1252 (2001) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)); see also *Moeller Bros. Body Shop, Inc*., 306 NLRB 191 (1992) (holding that the "Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance."); *Mathews-Carlsen Body Works*, 325 NLRB 661, 662 (1998) (finding that had the Union exercised reasonable diligence, the Union would have become aware that Respondent had not made fringe benefit payments on behalf of a majority of the employees); *but see R.R.R. Restaurant*, 314 NLRB 1267, 1268 (1994) (finding the Union had no knowledge of the repudiation of benefits where the employer consistently made late payments.). The burden of showing such clear and unequivocal notice is on the party raising Section 10(b) as an affirmative defense. *See Dedicated Services*., 352 NLRB 753, 759 (2008).

The Board has, in various circumstances, held that knowledge must be imputed directly to a union, and not to third parties, in order for the union to have constructive knowledge of an unfair labor practice. See *Dedicated Services*, supra (and cases cited therein). Moreover, in situations involving unions and benefit trust funds, it is well-settled that the law recognizes that labor organizations, and employers for that matter, are not presumed to be affiliated with multiemployer benefit funds, or to be anything but separate and distinct entities. *NLRB v. Amax Coal Co*., 453 U.S. 322 (1981); *Operating Engineers Local 12 (Griffith Co.)*, 243 NLRB 1121, 1125 (1979), affd. 660 F.2d 406, 411 (9th Cir. 1981). The activities of such a fund will be binding on a labor organization only upon a specific showing of agency responsibility. *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984). Here, Respondent has adduced no such evidence and, to the contrary, has argued that these entities are unrelated. Overall, then, the Union, and not the Fund, must have had knowledge of the wrongdoing in order for the Section 10(b) period to begin.

That being said, I do not agree with the General Counsel that the Union was not in a position to know about the delinquencies in pension contributions prior to the February 2009 conference call. I find that the record here shows that the Union had sufficient facts at an earlier occasion to warrant the exercise of due diligence in this matter.

In particular, I find that this occurred in October 2008, when Blount wrote to Healthcare and Sunshine returning checks for a period from August 2003 through January 2007 and sent a copy of this letter to Union president Silva. In my view, the apparent failure of the employer to remit contributions after January 2007 was sufficient notice to trigger the Union's obligation to inquire as to why there were no contributions received after that date.[53] While it can be argued that there was no "clear and unequivocal" evidence of wrongdoing at this point, the Union was put on notice of facts that reasonably would have engendered suspicion that an unfair labor practice had occurred and a simple inquiry would have revealed that the employer had ceased making payments, as was the case after the Union and the Fund held their conference call. *Ohio & Vicinity Reg'l Council of Carpenters, supra; St. Barnabas Medical Center, supra; Mathews-Carlsen Body Works*, supra. I note that Respondent has failed to adduce evidence of any reporting requirement or any other basis for

[53] I additionally note that Blount specifically noted that most of the checks were more than six months old, yet another indication that timely payments were not being made. In addition, for the foregoing reasons, I do not credit Blount's testimony that the Fund was unaware that the Healthcare and Sunshine had ceased making contributions to the Fund until February 2009.

me to conclude that actual or constructive knowledge had or should have occurred on a prior occasion.

Respondent points to the November 2006 e-mail exchange between Union representative Alcoff and Fund collections manager Salm regarding the relationship between the Omni facilities and Healthcare and Sunshine. From these communications it is apparent that the Union was aware that the Fund had failed to deposit the remittances sent by Healthcare and Sunshine. From the evidence, however, it is also apparent that at that time Healthcare and Sunshine were continuing to make appropriate contributions. Thus, at the time these e-mails were exchanged there was no extant unfair labor practice. Moreover, there is no basis for me to impute to the Union constructive knowledge of any future failure to remit contributions to the Fund.

Accordingly, based upon the record evidence as adduced by the parties, and bearing in mind that it is incumbent upon Respondent to meet its burden of proof in asserting this affirmative defense, I find that it was not until October 10, 2008, that the Union had sufficient facts at its disposal to ascertain that the Employer had failed to make contributions for a significant component of the bargaining unit.

Inasmuch as, by that time, the 2002 MOA had expired, a timely charge had to be filed and served not more than six months after the Union received actual or constructive notice of the unfair labor practice. See *Chemung Contracting Corporation*, 291 NLRB 773 (1988); see also *Park Inn Home for Adults*, 293 NLRB 1082, 1083 (1989). Thus, here the Union was required to file and serve its charge no later than six months after October 10, 2008, the date on which it should have known of the Employer's alleged wrongdoing. See generally *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). (Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.)

The Union filed its amended charge on April 9, 2009. The record demonstrates that it was sent to the Respondent and its counsel of record by the regional office on April 10, the following day. In accordance with Sec. 102.113 of the Board's Rules and Regulations, the date of service is the day on which the charge is deposited in the mail. See *Sioux Quality Packers*, 228 NLRB 1034, 1037 (1977); *Heartshare Human Services*, 339 NLRB 842, 847 (2003). Thus, the amendment to the charge was filed and served within the six month period after the Union received constructive notice of the unfair labor practice, albeit just barely.[54] Accordingly, I find that the Union's charge was filed and served in accordance with the provisions of Section 10(b) of the Act.[55]

As noted above, the amended charge alleges a failure to remit pension contributions dating from July 2007. The amended complaint, however, alleges that the failure to remit such contributions dates back to February 2007. Here, based upon the principles of *Redd-I*, supra, I find that the variance between the charge and the allegations of the complaint are not time-barred. The charge and the complaint involve the same theory of violation of the Act, sequence of events and defenses interposed by Respondent. In addition, the timing of the violation was a matter fully litigated at the hearing. See *Concourse Nursing Home*, supra at 694 fn. 13.

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[54] See *MacDonald's Industrial Products*, 281 NLRB 577 (1986) (limitations period begins to run on the date after the alleged unfair labor practice occurs and does not include the day of the alleged unfair labor practice).

[55] Section 102.14 of the Board's Rules and Regulations provides that the charging party shall be responsible for the timely and proper service of the charge. However, the Board and the courts historically have held that service by the Board's regional office is sufficient, as long as it is timely. See *T.L.B. Plastics Corp.*, 266 NLRB 331, fn. 1 (1983) and cases cited therein.

c. The Unilateral Cessation of Pension Fund Contributions

Having found that the charge is timely filed and served and the allegations of the amendment to the complaint are not barred by the applicable statute of limitations, I will now proceed to evaluate the evidence adduced in this matter. As noted above, Blount testified that the final checks from Healthcare and Sunshine were received in May 2007, and were remittances for the month of January 2007. Blount's testimony that no contributions were received thereafter, was unrebutted by probative evidence.[56] There is no evidence that the Union was afforded notice or an opportunity to bargain over this issue at any relevant time.

Respondent further argues that it was the Fund that returned the remittance checks to Healthcare and Sunshine, and accordingly there is no evidence that the Employer deliberately failed to make contributions. Inasmuch as the Employer ceased sending contributions for periods after January 2007, which is well over one year prior to the return of any checks, the logic of this argument is unclear. While the Fund cannot be said to be blameless in these circumstances, applicable law makes clear that an employer's motive is not an element essential to a finding that a unilateral change is violative of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962); *Gulf Coast Automotive Warehouse*, 256 NLRB 486, 488-489 (1981*); Merrill & Ring, Inc.*, 262 NLRB 362 (1982). Here, Respondent had a continuing obligation to make contributions to the Fund on behalf of its unit employees, notwithstanding any apparent failure on the part of the Fund to act with some measure of diligence in this matter. [57]

Accordingly, I find that Respondent unlawfully ceased remitting pension contributions for bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act, as alleged in the complaint, as amended.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying in or failing and refusing to provide certain information requested by the Union in its letters of October 19, 2007 and February 14, 2008, which was necessary for and relevant to the performance of the Union's duties as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time licensed practical nurses, certified nurses aides, dietary and housekeeping and recreation employees employed by Respondent at its Jersey City, New Jersey facility.

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[56] As noted above, to the extent Healthcare and Sunshine may have resumed making Fund contributions on behalf of unit employees in 2008 and 2009, this goes to the mitigation of Respondent's liability and is appropriately addressed in compliance proceedings.

[57] To the extent that Healthcare and Sunshine may have remitted contributions for unit employees during the period from January 2008 to June 2009, this is a matter appropriately addressed in a subsequent compliance proceeding.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by implementing its final offer and unilaterally changing terms and conditions of employees in the above-described unit without having reached agreement with the Union and in the absence of a valid bargaining impasse.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally ceasing to remit contributions to the SEIU National Industry Pension Fund.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that the Respondent supply the requested information, other than that which has already been provided, to the Union. I additionally recommend that Respondent be ordered to place into effect all terms and conditions of employment which were in existence on July 24, 2007, and to maintain those terms in effect until a new contract is concluded, the parties have bargained to a valid impasse or the Union has agreed to the changes. Provided, however, that nothing in this recommended Order is to be construed as requiring that Respondent cancel any unilateral changes that benefited the unit employees without a request from the Union. I also recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final offer on or about April 1, 2008 or its unilateral discontinuance of contributions to the SEIU National Industry Pension Fund in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons*, supra. I further recommend that the Respondent be ordered to make all contributions to any benefit fund established by the collective-bargaining agreement with the Union which was in existence on July 24, 2007, and which contributions the Respondent would have made but for the unlawful unilateral changes, including all required contributions to the SEIU National Industry Pension Fund, including any additional amounts due to the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 6 (1979).[58]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[59]

ORDER

Respondent Harbor View Health Care Center, Jersey City, New Jersey, its officers, agents, successors and assigns, shall

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[58] I leave for the compliance portion of these proceedings the appropriate computation of interest and additional sums due with respect to those Fund remittances which had been timely made by the Employer but not processed by the Fund.

[59] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing to provide to the Union, or unnecessarily delaying in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's employees in the following unit:

All full-time and regular part-time licensed practical nurses, certified nurses aides, dietary and housekeeping employees and recreation employed by Respondent at its Jersey City, New Jersey facility.

(b) Failing to adhere to the terms and conditions of employment that were in existence on July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

(c) Implementing terms and conditions of employment that are different from those in existence on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

(d) Failing and refusing to remit contributions owed to the SEIU National Industry Pension Fund.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in a timely and complete manner, the information requested in the Union's letters of October 19, 2007 and February 14, 2008, that has been found necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of employees in the above-described unit, to the extent such information has not been previously provided to the Union.

(b) Make a reasonable effort to secure any unavailable information requested in the Union's letters described above and, if that information remains unavailable, explain and document the reasons for its continued unavailability.

(c) On request, restore, honor and continue the terms and conditions of employment which were in effect on July 24, 2007, in the manner set forth in the remedy section of this decision, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

(d) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful alteration or discontinuance of contractual benefits, with interest, as provided for in the remedy section of this decision.

(e) Make contributions, including any additional amounts due to any benefit fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which Respondent would have paid but for its unlawful unilateral changes, as provided for in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the

Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Jersey City, New Jersey copies of the attached notice marked "Appendix."[60] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2007.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C, March 10, 2010.

_____
Mindy E. Landow
Administrative Law Judge

[60] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail to provide to the Union, or unnecessarily delay in providing information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the employees in the following unit:

All full-time and regular part-time licensed practical nurses, certified nurses aides, recreation employees, dietary and housekeeping employees employed by Harborview Health Care Center at its Jersey City, New Jersey facility.

WE WILL NOT fail to comply with the terms and conditions of employment that were in existence on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL NOT implement terms and conditions of employment that are different from those that were in existence on July 24, 2007, before a new contract is concluded or good-faith bargaining leads to a valid impasse, or the Union agrees to the changes.

WE WILL NOT fail and refuse to remit contributions owed to the SEIU National Industry Pension Fund.

WE WILL NOT In any like or related manner interfere with, restrain or coerce you in the exercises of the rights guaranteed you by Section 7 of the Act.

WE WILL restore, honor and continue the terms and conditions of employment that were in effect as of July 24, 2007, until a new contract is concluded or good-faith bargaining leads to an impasse, or the Union agrees to changes.

WE WILL make employees and former employees whole for any and all loss of wages and other benefits incurred as a result of our unlawful alteration or discontinuance of contractual benefits, with interest.

WE WILL make contributions, including any additional amounts due, to any fund established by the collective-bargaining agreement that was in existence on July 24, 2007, and which we would have paid but for our unlawful unilateral changes.

HARBOR VIEW HEALTH CARE CENTER

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.